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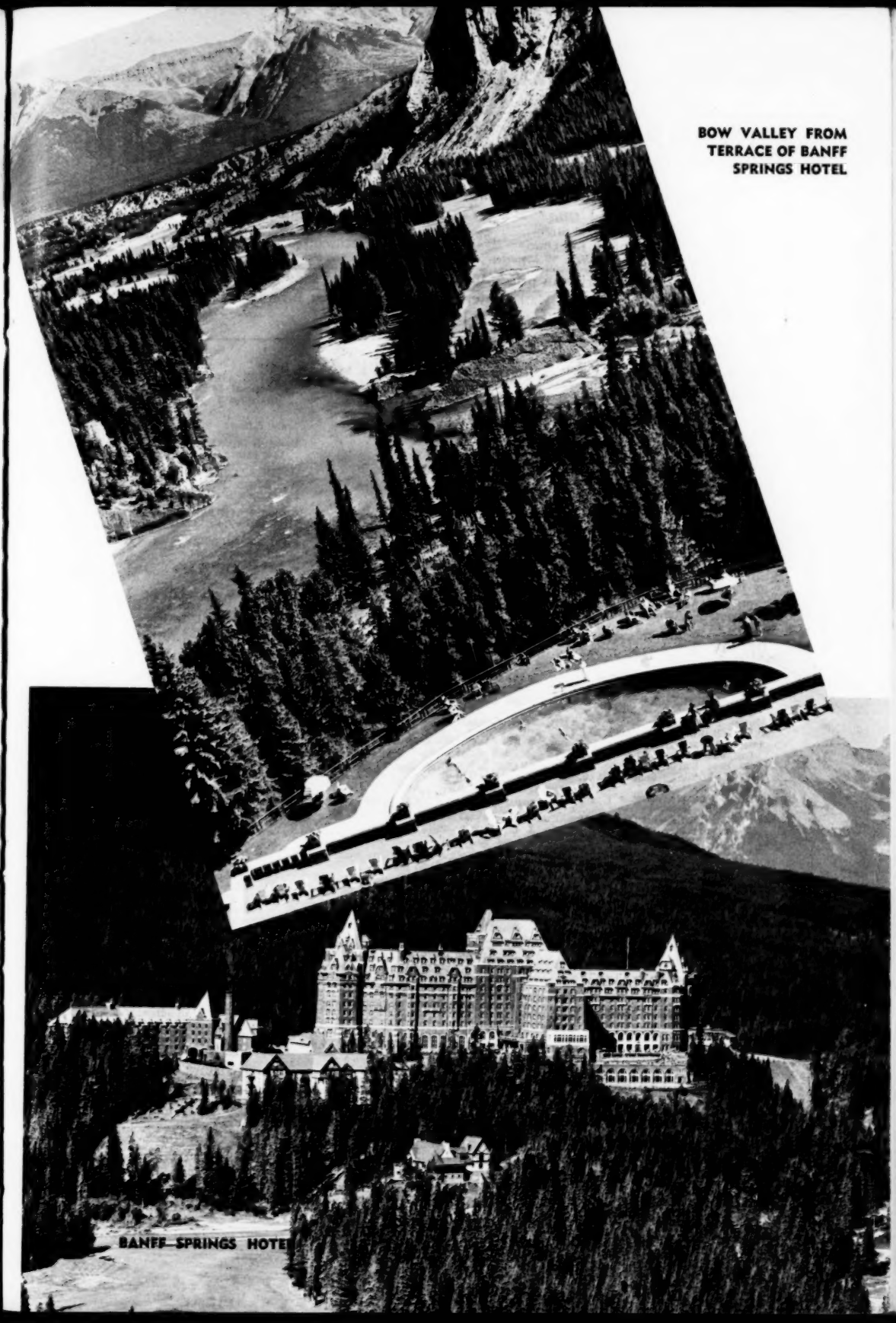

BOW VALLEY FROM
TERRACE OF BANFF
SPRINGS HOTEL

INSURANCE COUNSEL JOURNAL

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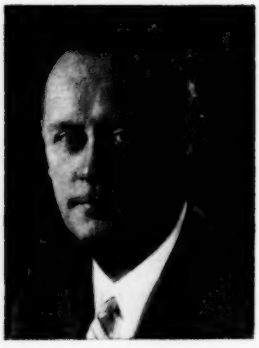
PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page



LET'S TALK ABOUT BANFF. As you know the Convention will be at Banff Springs Hotel on Tuesday, Wednesday and Thursday, June 30, July 1 and 2, 1959. Normally, comments with respect to the Convention more appropriately appear in the April issue of the Journal. However, with your indulgence, I shall accelerate, as some of these observations would be tardy if received by you in April.

It is, of course, fundamental that one of the primary purposes of our meetings is to promote and further the interests of the insurance industry by thought, word and deed of counsel interested in the field. I am happy to report that your Committees have been working diligently with a view of presenting to the members a sound and well organized program of progress.

Pictured in this issue is Banff Springs Hotel which stands at the confluence of the famous Bow and Spray Rivers in Banff National Park which, from a modest ten square miles in 1885, now covers an area of 2,564 square miles and stretches 125 miles along the Continental Divide.

Unique natural beauty is abundant in the Canadian Rockies; as one brochure graphically and accurately portrays the Park:

> "A vast area of magnificent mountains covered with glaciers, blankets of sparkling snow, with rocky peaks that stand as permanent sentinels guarding the lustrous green alpine valleys, lakes, rivers and streams that wind their merry way for hundreds of miles amongst the rich evergreens. Thousands of wild flowers sway lazily in the breeze and are to be disturbed only by the wild game which constantly roam the area."

This Journal also contains pictures of Chateau Lake Louise, a most attractive hotel, some forty miles from Banff Springs Hotel. The reason for reference to Chateau Lake Louise is that we respectfully submit that those who wish to arrive a few days prior to the Convention might be well advised to make reservations on an individual basis at Chateau Lake Louise.

During the course of the preparation for this Convention, it developed that Banff Springs Hotel, which will accommodate approximately 800 of our members, has a large convention departing from the hotel on Sunday, June 28th. It is therefore quite likely that on Saturday and Sunday Banff Springs Hotel may not be able to accommodate any large number of our members. On the other hand, we are faced with the very practical problem of transportation to Banff from a great many sections, geographically speaking.

There are definite limitations as to the number of trains and planes reaching Banff or Calgary (international airport) on Monday. In order to solve, at least partially, this problem your Committees have arranged that accommodations be available at Chateau Lake Louise, Lake Louise, Canada, prior to the Convention. It is respectfully submitted that for those who find it convenient, arrival in the Banff area prior to Sunday and Monday, June 28th and 29th will be more suitable rather than to have the entire group converge on Banff Springs Hotel on Monday, June 29th, which is the official day of registration. We think we are reasonably safe in saying that anyone who spends a few days at Lake Louise will have a memorable visit.

It will be necessary for you to make your reservations on an individual basis directly with Mr. D. A. Williams, Manager of Chateau Lake Louise, Lake Louise, Alberta, Canada. Your requests for reservations at Chateau Lake Louise should not be presented to or through the office of the Association.

The Chateau Lake Louise is on the European plan, but after a careful study we are entirely satisfied that there will be only a nominal difference between the cost per day on the European plan and the American plan convention rates in effect at Banff Springs Hotel during the actual days of the meeting.

We have also had in mind, in making arrangements at Chateau Lake Louise for early arrivals, that some may wish to avail themselves of the "Family Plan" offered by the railroads and airplanes. No specific statement can be made as to each segment of the country, but attention is called to the fact that certain railroads require departure from point of origin on specified days; some airlines require, in effect, completion of the trip within specified days.

Accompanying the announcement regarding the reservations at Banff Springs Hotel was a report of the Transportation Committee. We urge you to read this report carefully and respectfully suggest that it would be advisable for you to make reservations by train or plane promptly.

It is my fervent hope that your visit to Banff will add another link to the chain of pleasant memories of the meetings with your fellow members.

G. ARTHUR BLANCHET
President

CHATEAU LAKE LOUISE

LAKE LOUISE

CURRENT DECISIONS

Recent decisions of the courts dealing with insurance and negligence law and practice are included in these pages. Journal readers are asked to send in digests of such rulings. Unreported cases dealing with novel questions are especially desired. Members of I.A.I.C. should submit their contributions to their State Editors.

Edited by
R. HARVEY CHAPPELL, JR.
Richmond, Virginia

AGENCY—
INSURER NOT BOUND BY ACTION AND KNOWLEDGE OF SOLICITING AGENCY

Jackson v. M.F.A. Mutual Insurance Company, 165 F. Supp. 388 (W.D. Ark., 1958)

Insurer issued policy covering poultry house and subsequent to issuance of policy the insured premises were leased as a factory. Insurer's agent was advised of this and he stated that he would "take care of it". The agent was not empowered to waive policy provisions and was merely a soliciting agent, the approval for any insurance being required by insurer's home office. The Arkansas United States District Court held that where the policy itself negates the authority of an agent to waive its provisions those who deal with such agents must determine at their own risk the extent of the agent's authority. The plaintiff failed to sustain the burden of showing real or apparent authority on the part of the defendant's agent and the knowledge of the change in use in the insured premises was not imputed to the insurer. Accordingly, judgment was rendered for the defendant insurer.

CONTRIBUTORY NEGLIGENCE DISTRACTION RULE

Deane v. Johnston, 104 So. 2d 3 (Fla., 1958)

A pedestrian sued the owner of a weighing machine located on a sidewalk, the pedestrian having been injured when she tripped and fell across such machine. A judgment was rendered for the plaintiff and on appeal the Florida Supreme Court affirmed this judgment. The Florida court reviewed the law of contributory negligence generally and concluded that the defendant could set up the plea of contributory negligence even though the location of the weighing machine on the sidewalk tended to constitute a nuisance, the court reasoning being that the defendant had not intended to obstruct passage along the sidewalk and therefore could not be said to have been reckless or wanton. However, the court then held that the question of contributory negligence properly was submitted to the jury, the court having endorsed the so-called "distraction rule" whereunder if plaintiff's attention were diverted from the known danger by sufficient cause the question of contributory negligence is one for the jury.

(Contributed by William M. O'Bryan, Fort Lauderdale, Florida, State Editor for Florida)

DAMAGES—
RECOVERY WHERE FRIGHT UNACCOMPANIED BY PHYSICAL CONTACT

Bosley v. Andrews, 142 A. 2d 263 (Pa., 1958)

In an action to recover damages for injury to heart brought on by coronary insufficiency resulting from fright and shock when chased by defendant's bull, the plaintiff was denied recovery by the Supreme Court of Pennsylvania. The established rule that recovery shall be denied for injuries resulting from fright or shock unaccompanied by physical impact was followed. For an interesting case touching on this rule see *Greenberg v. Stanley,* 143 A. 2d 588 (N.J., 1958).

DISCOVERY—
INCOME TAX INFORMATION NOT PRIVILEGED

Star v. Rogalny, 22 F.R.D. 256 (E.D. Ill., 1958)

In an action for injuries alleged to have been sustained in an automobile accident the plaintiffs asserted that they lost large sums of money due to loss of wages and inability to carry on their business because of such injuries. The defendant requested by interrogatories certain information concerning the plaintiffs' income for prior years. The plaintiffs moved to strike the interrogatories on the ground that the information requested was privileged under a section of the Internal Revenue Code (26 U.S.C.A. §6103) protecting taxpayers against public disclosure of contents of tax returns. The United States District Court for the Eastern District of Illinois held that the objection interposed by the plaintiffs was not well founded and that the information contained in income tax returns of plaintiffs was proper material to be inquired into by interrogatories under Federal Rules of Civil Procedure. The plaintiffs having made the amount of their income an issue in litigation, it thereupon becomes a legitimate subject of inquiry.

EXCESS LIABILITY—
GOOD FAITH TEST APPLIED

American Fidelity & Casualty Company v. Greyhound Corp., 258 F.2d 709 (5 Cir., 1958)

Insured brought action against insurer for exercising bad faith in settlement of tort claim against insured. The United States Court of Appeals for the Fifth Circuit applied the applicable Florida law which, as the court observed, " . . . aligned itself with the majority of jurisdictions adhering to the good faith test of the duty placed upon an insurer, rather than the negligence test". The court held that the evidence was sufficient to take the insured's case to the jury and a verdict for excess liability was affirmed with a further ruling that the insured was entitled to recover a reasonable sum as fees for its attorneys in prosecuting the action.

FEDERAL EMPLOYERS LIABILITY ACT—
PLAINTIFF'S VERDICT REVERSED BECAUSE OF TRIAL ON IMPROPER ISSUE

Butler (Trustee of Florida East Coast Railway) v. Smith, 104 So. 2d 868 (Fla., 1958).

In an action brought under the Federal Employers Liability Act judgment was rendered for the plaintiff. On appeal the verdict was reversed and the case remanded for new trial because the case originally was tried on an improper issue. During the course of the trial the plaintiff's counsel raised the issue of the propriety of the railroad having required the plaintiff to submit to test to demonstrate his physical ability to carry on his job as flagman. The test was designed to coincide with duties to be performed by a flagman and during this test plaintiff was injured. The court observed that the only real issue was whether the railroad had provided the plaintiff with a reasonable and safe place to work. The test required of the plaintiff was an improper issue in the case and tended to implant in the minds of the jury prejudice or bias against the defendant.
(Contributed by William M. O'Bryan, Fort Lauderdale, Florida, State Editor for Florida)

FIRE INSURANCE—
INCREASE OF RISK OR HAZARD

New England Insurance Company v. Cummings, 164 F.Supp. 553 (S.D. Miss., 1958)

In a suit by an insurer for declaratory judgment with respect to loss claimed by insured under a fire policy judgment was rendered for the insurer. The United States District Court for the Southern District of Mississippi held that where, when application for fire policy on a restaurant and nightclub was made the club was a growing concern and open under a manager on the premises and after the binder was issued the condition changed and the club was closed and no one was left in attendance, there was a material change which increased the hazard and the insurance binder issued by insurer was void.

FIRE INSURANCE–
MISREPRESENTATION AFTER LOSS VOIDS POLICY

Tenore v. American and Foreign Insurance Company, 256 F.2d 791 (7 Cir., 1958)

The insureds, a partnership, engaged in a mail order gun business. A fire of undetermined origin occurred on insured's premises and following the fire the insured prepared an inventory on which the insured listed certain guns as new and valued them accordingly. Actually the guns were over fifty years old and generally in bad condition. The United States Court of Appeals for the Seventh Circuit reversed a judgment for the plaintiff and entered judgment for the defendants. The fire insurance policy contained a provision that the entire policy should be void if the insureds conceal or misrepresent any material facts or circumstances concerning the insurance or in any case of fraud or false swearing relating thereto. Here, the valuation placed upon the property by the insured amounted to false swearing as a matter of law and, therefore, the insured was not entitled to recover any sum under the policy.
(Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

GUEST STATUTE–
AUTOMOBILE OWNER IS GUEST OF DRIVER

Phelps v. Benson, 90 N.W. 2d 553 (Minn., 1958)

In an interesting Minnesota case the owner of an automobile has been held to be a guest and thereby subject to the provisions of the guest statute requiring a showing of "willful and wanton" conduct to allow of recovery. The action arose as the result of an accident which occurred while the plaintiff's automobile was being driven by another, the plaintiff being a passenger. The Minnesota Supreme Court reviewed conflicting decisions on the point and held that the plaintiff was a guest of the driver and that the mere fact of ownership would not preclude such guest status. For a contrary ruling see *Gledhill v. Connecticut Co.,* 121 Conn. 102, 183 Atl. 379 (1936).

LIABILITY–
LIABILITY POLICY DOES NOT AFFECT SOVEREIGN IMMUNITY

Livingston v. Regents of New Mexico College of A. & M. A., 328 P.2d 78 (N.M., 1958)

A suit was brought by a student of one of the state colleges of New Mexico based on injuries sustained at the college cafeteria allegedly due to negligence of a cafeteria employee, the suit having been brought against the regents of the college. A liability policy had been obtained by the regents and the recovery sought by the student was within the limits of such policy. The Supreme Court of New Mexico held that the student could not recover inasmuch as the suit violated the rule of sovereign immunity. The fact that the regents had obtained a liability insurance policy did not change this. For a contrary rule see *Thomas v. Broadlands Community Consol. Dist.,* 348 Ill. App. 567, 109 N.E. 2d 636 (1952).

LIABILITY OF INSURER–
SELF INSURANCE NOT "OTHER INSURANCE"

Home Indemnity Company v. Humble Oil & Refining Company, 314 S.W. 2d 861 (Tex. 1958)

In a case of first impression the Court of Civil Appeals of Texas has held that self-insurance is not "other and valid collectible insurance" such as would entitle an insurer to compel a self-insurer to contribute to the payment of a loss. Humble Oil & Refining Company is a self-insurer and qualified under the Texas Safety Responsibility Law by filing a certificate of self-insurance. An employee of Humble carried a liability policy with Home Indemnity under which coverage was extended to include any other car that such employee might drive, this being in the nature of excess coverage not covered by "other valid and collectible insurance". While driving a Humble owned car, but on a personal mission, the employee was involved in a collision and the object of the current suit was to determine whether Home Indemnity or Humble would be required to bear the loss occasioned by settlement of the suit for damages which

arose from the accident. The Texas court observed that to say that a self insurer will pay the same judgments and in the same amounts as an insurance company pursuant to the Texas Safety Responsibility Act is one thing but that to assume all the obligations that exist under a standard automobile liability policy is quite another. Such a policy calls for the assumption of many obligations other than the payment of a judgment rendered against insured.

(Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

LIFE INSURANCE–
DOUBLE INDEMNITY PROVISION APPLICABLE

Gaskins v. New York Life Insurance Company, 104 So. 2d 171 (La., 1958)

The policy issued on the life of the insured contained a double indemnity provision applicable where death resulted from "external, violent and accidental means". While undergoing surgery the insured died from anaphylatic shock brought on by reaction to a blood transfusion. The Supreme Court of Louisiana held that the death of the insured was produced by accidental means within the double indemnity provision. Compare *Landress v. Phoenix Mutual Life Insurance Company,* 291 U.S. 491, 54 S. Ct. 461, 78 L.Ed. 934 (1933), which held that a double indemnity provision would not be applicable where death is the accidental result of an intended act.

LIFE INSURANCE–
SUICIDE STATUTE DOES NOT VOID POLICY EXCLUSION

Kaskowitz v. Aetna Life Insurance Company, 316 S.W. 2d 132 (Mo., 1958)

Insured took his own life by jumping from a building and his beneficiaries sought to recover under double indemnity rider. Insurer set up as defense a specific exclusion in the double indemnity rider, namely, that the rider should not apply where death resulted from a suicide while insane. Beneficiaries invoked Missouri suicide statute which provides that an insurer shall not set up suicide as a defense unless it be shown to the satisfaction of the court and jury trying the cause that the insured contemplated suicide at the time he made application for the policy and any stipulation in the policy to the contrary shall be void under the terms of the statute. The Missouri Court of Appeals held that no recovery should be allowed. The suicide statute does not operate to put into the policy any obligation other than those assumed in the policy and it merely serves to take out of the policy the defense of suicide as to the obligations actually assumed. In the case at bar the policy expressly excluded an accidental death resulting from mental infirmity and, as the court observed, the reason for the exclusion undoubtedly was because of the increased likelihood of accidental injury to persons of unsound mind and since it is all inclusive as to a particular class of accidents the suicide statute cannot effect its removal.

NEGLIGENCE–
DRIVING ON WRONG SIDE OF ROAD NOT CONCLUSIVE IN ASSIGNING FAULT

Years v. Waite, 178 N.Y.S. 2d 283 (1958)

In an action against defendant driver for the death of guest passenger as result of collision between defendant's automobile and oncoming vehicle which was on wrong side of road at time of collision the jury returned a verdict for defendant's driver. On appeal, the New York court held that the mere fact that the other automobile was on the wrong side of the highway did not excuse the defendant driver from what the court conceived to be negligence which was a proximate cause of the accident. The court observed that the defendant's automobile was traveling at an excessive rate of speed, the defendant had certain physical impairments and the existing weather conditions all tended to show negligence on the part of the defendant driver also.

PRODUCTS LIABILITY–
CASE SHOULD HAVE BEEN WITHDRAWN FROM JURY BECAUSE OF INSUFFICIENT EVIDENCE

Ford Motor Company v. McDavid, 259 F.2d 261 (4 Cir., 1958)

Automobile passenger brought action

against automobile manufacturer for injuries sustained in an accident allegedly caused by the negligence of the manufacturer in aligning front wheels resulting in excessive wear of tire and causing it to blow out after the automobile had been driven only 2600 miles. The evidence disclosed that the misalignment of the front wheels could have been introduced by any number of mechanics who had inspected and worked on the automobile in the intervening period since leaving the factory, by parking lot attendants or by any one of the infinite variety of bumps and blows in normal driving which could have changed the alignment. The Fourth Circuit Court of Appeals held that the evidence was insufficient to support a verdict for the plaintiff and judgment was entered for the defendant, the court commenting:

> "The old notion that a jury should not be allowed to draw any inference from circumstantial evidence, if the one is as probable as the other, has fallen into discard and has been replaced by the more sensible rule that it is the province of the jury to resolve conflicting inference from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture."

PROPORTIONATE LIABILITY OF INSURERS— PRORATION ON BASIS OF PREMIUM

Insurance Company of Texas v. Employers Liability Assurance Corp., 163 F.Supp. 143 (S.D. Cal., 1958)

The United States District Court for the Southern District of California has held that where two insurers each had issued separate liability policies covering the same automobile, in prorating the loss the basis should be the premiums paid rather than the limits of liability. One of the policies provided that if the insured had other insurance the insurer should not be liable for a greater proportion of the loss than the applicable limit of liability stated in the declarations bears to the total applicability of liability of all valid and collectible insurance. The other policy provided that it would be void if other valid insurance exists except that it would apply as excess insurance in the event the limits of the other policy were exceeded. The first policy had limits of $25,000/$50,000. and the second policy had limits of $300,000/$1,000,000. The court held that these "other insurance" provisions actually mean the same thing and should be disregarded. See *American Surety Company of New York v. Canal Insurance Company*, 258 F.2d 934 (4 Cir., 1958), in which the court draws the distinction between the situation where the obligations of two insurers are concurrent and prorata and that where the obligations are primary and secondary or excess.

WORKMENS COMPENSATION— STROKE HELD TO BE COMPENSABLE INJURY

Aetna Insurance Company v. Hart, 315 S. W. 2d 169 (Tex., 1958)

The claimant was employed by a cleaning and pressing establishment and shortly after being involved in an argument with a dissatisfied customer the claimant suffered a stroke. Claimant testified that she was afraid of the customer and feared that he might do her physical harm. Claimant was overweight and suffered from high blood pressure and arteriosclerosis. An award for the claimant was affirmed on the ground that there was sufficient evidence to support the finding that the stroke was caused by emotional stimulus and therefore an accidental injury in the course of employment.

(Contributed by J. Kirby Smith, Dallas, Texas, State Editor for Texas)

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INTERESTING READING*

BENEFICIARIES OF WRONGFUL DEATH ACTION DETERMINED AT TIME ACTION BROUGHT

Rushton v. Smith, S.C., 104 S.E.2d 376.

Under South Carolina law, a wrongful death action is for the benefit of the wife or husband and children of the deceased person, and in the absence of such relatives, for the benefit of the parents of the deceased person. The wife in the instant case received fatal injuries in an automobile accident while riding with her husband. Upon the husband's subsequent death, the administrator of the wife's estate brought a wrongful death action against the administrators of the husband's estate for the benefit of the wife's parents. The Supreme Court, in an opinion by Stukes, C. J., overruled the objection that the cause of action descended to the husband's heirs and stated that the cause of action had passed on his death, to the next class of statutory beneficiaries.

BABE CARRIED INTO SHOP IS INVITEE

Anderson v. Cooper, Ga., 104 S.E.2d 90.

Georgia Code, § 105-402 provides as follows: "A licensee is a person who is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted expressly or impliedly to go thereon merely for his own interest, convenience or gratification. The owner of such premises is liable to a licensee only for wilful or wanton injury." The Supreme Court of that State, in an opinion by Wyatt, P. J., declared that a nine-month old infant who was carried into a bakery shop by his father was not one who was "permitted expressly or impliedly to go thereon merely for his own interest, convenience or gratification" and therefore did not come within the statutory definition of licensee. Almand, J., dissented.

PLAINTIFF DENIED PRIVILEGE TO TAKE OWN DEPOSITION IN SPAIN

Smith v. Morrison-Knudsen Company, U.S.D.C.S.D.N.Y., 22 F.R.D. 108.

Plaintiff brought an action in the United States District Court for the Southern District of New York for damages for breach of employment contract and for libel. Plaintiff sought to have his own deposition taken upon written interrogatories submitted to himself in Spain where he was currently employed. Judge Herlands refused to permit this. The Court took into consideration the facts that plaintiff would not lose his job if he came to this country for the taking of his deposition or for trial, that his employers stated his services could be spared for two weeks, which was more than sufficient, and that his transportation expenses would not exceed $606.00.

DEATH RESULTING FROM BLOOD TRANSFUSION REACTION DOUBLE INDEMNITY PROVISION

Schonberg v. New York Life Insurance Company, La., 104 So. 2d 171.

A life policy provided for double indemnity in case of death through "external, violent and accidental means." During surgery, insured suffered a very rare blood transfusion reaction which produced fatal anaphylactic shock. In an opinion by Tate, Justice ad hoc, the Supreme Court of Louisiana has broken with precedent and has held that although death may have been the accidental result of an intended act under the former rule, under the test now announced it was produced by accidental means within the double indemnity provision.

INSTALLMENT VERDICT APPROVED

M & P Stores v. Taylor, Okla., 326 P.2d 804.

In a personal injury action, the jury returned a verdict for plaintiff for $3,600 to be paid at $150 per month for 20 years. Neither party objected to the form of the verdict and the court accepted it and discharged the jury. The court subsequently struck out the directions as to the method of payment as surplusage. The Supreme Court of Oklahoma, in an opinion by Corn, Vice Chief Justice, criticized the form of the verdict and said it should not have been received but concluded that since it had been received without objection, judgment should have been rendered upon it. The court directed that interest would run on each monthly installment from the due date only.

HUSBAND'S EMPLOYER NOT LIABLE FOR DAMAGE TO ENTIRETIES PROPERTY CAUSED BY HUSBAND

Stitzinger v. Stitzinger Lumber Co., Pa., 144 A.2d 486.

A tenant by the entireties while in the course of his employment drove his employer's vehicle onto the entireties property. The Superior Court of Pennsylvania, Gunther, J., refused to permit recovery for this damage from the employer. The Court said that a person cannot recover for damages he inflicts upon his own property and that the unity of estate created by the tenancy therefore precluded recovery.

LIABILITY INSURER LIABLE IN EXCESS OF POLICY LIMITS FOR FAILURE TO SETTLE

Comunale v. Traders & General Insurance Company, Cal., 328 P.2d 198.

Insured struck pedestrians while driving a truck that did not belong to him and insurer denied liability contending that the policy did not provide coverage under such circumstances. It did not undertake to defend the subsequent suit against the truck driver and refused to accept an offer of settlement within the policy limits communicated to it by the truck driver during the course of the trial. The verdict exceeded the policy limits. The Supreme Court of California, speaking through Chief Justice Gibson, found in the policy an implied obligation of good faith and fair dealing which required the insurer to settle.

INTEREST ON JUDGMENT EXCEEDING POLICY LIMITS INSURER'S RESPONSIBILITY

River Valley Cartage Co. v. Hawkeye-Security Ins. Co., Ill., 152 N.E.2d 603.

A judgment of $175,000 was rendered against one having an automobile liability policy which limited insurer's liability to $50,000. The policy provided that the insurer would pay "all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability". The insurer did not tender payment for over a year and the judgment creditor refused the tender because it did not include accrued interest. The Appellate Court of Illinois held that the insurer was liable for the interest on the entire judgment, not just its share thereof, until the date of tender. The Court also ruled that the tender was proper and stopped the accrual of interest. Opinion by Robson, J.

DEPOSITIONS RULE APPLICABLE TO UNITED STATES

Fay v. United States, U.S.D.C.N.Y., 22 F.R.D. 28.

In actions against the United States to recover for personal injuries allegedly sustained while performing stevedoring work on board vessels of the United States, libelants sought to employ the discovery procedure provided for by Federal Rule of Civil Procedure, rule 26, 28 U.S.C.A. Libelants served the United States with notices to take its depositions upon oral examinations by its officer or managing agent and also by the captain or chief officer in charge of the vessel. The U. S. District Court for the Eastern District of New York, Zavatt, District Judge, has approved this procedure. In doing so, the Court pointed out that the United States in the fiscal year 1957 was a party in well over one-third of the civil cases commenced in the federal courts.

From the EDITOR'S NOTEBOOK

In this column, from time to time, the Editor will publish news and views that he believes may be of more than passing interest to the readers of the Journal. Any opinions expressed are either the personal sentiments of the Editor or are the opinions of those persons to whom they are attributed. Contributions to this column will be welcomed.

A NEW and intensely interesting book of real value to the negligence trial lawyer is "Head Injuries" by E. S. Gurdjian, M.D., and J. E. Webster, M.D., of Detroit, Michigan, published by Little, Brown and Company, of Boston. I.A.I.C. members who attended our Twenty-Ninth Annual Convention at The Greenbrier, in 1956, will remember Dr. Gurdjian for his participation in the splendid Open Forum dealing with injuries to the brain. See 28 Insurance Counsel Journal, page 411, issue of October, 1956.

In their new book, Doctors Gurdjian and Webster deal extensively with mechanisms, diagnosis and management of head injuries and they correlate and summarize a large amount of clinical and experimental material assembled over a twenty-five year period. What diseases and conditions can result from head injury, and how they are treated, are told in a chapter on post traumatic sequelae.

Of particular interest is the chapter on "Medicolegal Aspects of Head Injury." Here, Doctors Gurdjian and Webster draw on their extensive experience in the courtroom to describe the work of the expert witness in his examination of the patient, evaluation of the injury, and the presentation of his testimony in court.

The book contains some 700 illustrations, mostly from the authors' own files.

AN ENCYCLOPEDIC treatment of medicolegal problems is the subject-matter of another new work, "Lawyers' Medical Cyclopedia of Personal Injuries and Allied Specialties", published by The Allen Smith Co., of Indianapolis. This text, in three volumes, is edited by a group of lawyers and doctors headed by Dr. Charles J. Frankel, of the University of Virginia, whose writings have heretofore appeared in the Insurance Counsel Journal. A large number of doctors and lawyers are contributing to this Cyclopedia.

In Volume I, which is the only volume off the press to date, the interesting chapters include:

Evaluation of the Medical Expert
The Physician, the Hospital and the Law
Hospital and Medical Records
Anatomy of the Musculo Skeletal System
The Role of Rehabilitation
Fractures and Dislocations in General
The Intervertebral Disc
Whiplash Injuries of the Neck
Athletic Injuries

The volume is profusely illustrated and contains some splendid color plates.

THE much discussed Uniform Rules of Evidence are the subject of a paper by Professor Charles W. Joiner of the University of Michigan Law School, which begins at page 57 of this issue. Every trial lawyer practicing in the federal courts should familiarize himself with these proposed rules and then make his views known. You may be interested in reviewing the comments of Josh H. Groce, chairman of the I.A.I.C. Federal Rules of Civil Procedure Committee, in 25 Insurance Counsel Journal, at pages 151-152, issue of April, 1958. See also 20 F.R.D. 429.

WE ENJOYED a story told by Chief Justice Raymond S. Wilkins, of the Supreme Judicial Court of the Commonwealth of Massachusetts in addressing a

lawyers luncheon in Northern California. We reprint the story, with permission, from the Journal of the San Francisco Bar Association, with our thanks to State Editor Frank J. Creede who sent it to us.

"The freedom to speak one's mind concerning the judiciary apparently has its origin in England. It is there the custom, at least in certain courts, to determine the order in which barristers present their cases on any particular day by the order in which they sign a book kept for the purpose. A young barrister, presenting his first case, had the forethought to sign the book several days in advance. On the appointed day his case was called first. He was unopposed, but deemed it to be his duty to offer every bit of evidence, and advance every argument, that would serve to fortify his client's cause.

"This admirable devotion to duty did not endear him to his brethren at the bar waiting to present their own matters, since the day in question was also the opening of the horse racing season. In the middle of a forceful peroration, the young barrister had a note pressed into his hand by the attorney at the bottom of the list. He read it, quickly placed it in his pocket, and started to continue his argument.

"The judge, however, evinced an unseemly interest in the note and asked that it be passed up to him. The young barrister protested that the note was extremely personal and that he would prefer not to produce it. The judge insisted, and he reluctantly passed it forward. It read, 'Sit down. Can't you see the old fool is with you?' The judge read the note and said, 'Have you read this note, counsel?' 'Yes M'lord,' said the young barrister diffidently. 'Well,' the judge thundered, 'take it and read it again!' "

CALIFORNIA has aligned itself with the ever-increasing number of states that hold that a wife whose husband has suffered personal injuries may not collect damages for loss of consortium. This decision, in an opinion of first impression by Chief Justice Phil S. Gibson, was rendered in *Eloyce Deshotel v. Atchison, Topeka & Santa Fe Railway Co., et al.,* 50 A.C.601, 328 P.2d 449.

After the husband had obtained a judgment for $290,000 for personal injuries, his wife sought $100,000 more for loss of his "care, protection, consideration, companionship, aid, and society".

Chief Justice Gibson said, in part:

"The Legislature has not seen fit to alter the common law rule that the wife cannot recover for the loss of the consortium resulting from a negligent injury to her husband, and we are of the opinion that any departure from the overwhelming weight of authority in support of that rule should be left to legislative action."

It is also interesting that, in mentioning some of the points that should be considered with respect to legislation, Chief Justice Gibson said:

"For example, the Legislature, if it found this type of suit to be desirable, could define the extent of the liability, designate who may maintain the action, and provide safeguards against the danger of double recovery, such as a requirement that there be a joinder of the person directly injured and the one consequently harmed. The Legislature could also specify whether the proceeds should belong to the plaintiff alone or to both spouses."

This decision was called to our attention by Frank J. Creede, San Francisco, State Editor for California.

Insurance, Torts, and The Atom

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PRIOR to the passage by the Congress of the Atomic Energy Act of 1954[1] the extent of private activities in the field of atomic energy was insignificant by comparison with today. Private organizations participated in atomic energy primarily as contractors for the federal government. After the passage of the 1954 act, exclusive federal control over atomic energy activities (other than those relating to nuclear weapons) was significantly relaxed. Today private persons and organizations in ever growing numbers can and do possess nuclear materials, operate nuclear facilities and generally deal in trade in the goods and services of the industry subject, however, to AEC licensing and other regulations.

This development of a non-federally owned atomic energy industry and the passage of a recent amendment to the 1954 Act have emphasized certain insurance and tort problems which are the subject of this article.

Much of the activity of the industry starts with the reactor which is a device for producing a self-sustaining controlled chain reaction or fission. Fission is the splitting of the nucleus of an atom. This splitting of the nucleus gives off radiation, extreme heat, and radioactive fission fragments with the heat being used as a source of power and the radiation to produce radioactive material for many uses.

With the use of reactors two problems of considerable concern are immediately apparent. One is the possibility, no matter how remote, of an explosion as the atomic bomb is nothing more than an uncontrolled chain reaction. The other is that radiation can be extremely harmful and must be controlled not only at the reactor but also in the handling of fuel, disposal of radioactive waste material, and in the later use of materials which have been treated in the reactor. These reactor treated materials often become radioactive isotopes which are used for many purposes in different phases of numerous industries.

Prior to the entry of private business into the atomic energy industry the dangers of radiation were recognized as x-ray machines, fluoroscopes, and radium containing substances were known to cause radiation injuries if improperly used. However, with the development of the atomic energy industry there first occurred the possibility of an atomic explosion with attendant "fallout" of radioactive material and the opportunities for radiation injuries by materials used in and produced by reactors greatly increased. The problem of liability for those in the industry was immediately recognized by the industry, by private insurance companies, and by the federal government.

The Federal Atomic Energy Act of 1954 was amended September 2, 1957 by the Price-Anderson Act[2] to provide for governmental indemnity in excess of "financial protection" for "public liability" arising out of and in connection with a licensed activity where "financial protection" has been required by the federal government. However, this amendment does not provide indemnification nor require financial protection except in certain instances.

By the Price-Anderson Act, Section 170 (a)[3] of the 1954 Act now provides that each license issued under Section 103 or 104 and each construction permit issued under Section 185 shall, and each license issued under Section 53, 63, or 81 may, have as a condition of the license a requirement that the licensee have and maintain "financial protection" of such type and in such amounts as the Atomic Energy Commission shall require to cover "public liability" claims and whenever such financial protection is required, it shall be a further condition of the license that the licensee execute and maintain an indemnification agreement.

The Sections 103 and 104 for which the licensee is required to have financial protection and for which the licensee is also indemnified by the government cover any equipment or device determined by the

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[1] 42 U.S.C., Sec. 2011, et. seq.

[2] 42 U.S.C., Sec. 2014 and 2210.

[3] 42 U.S.C., Sec. 2210.

commission to be capable of the production of special nuclear material or making use of special nuclear material in such quantity as to be of significance to the common defense or security or in such manner as to affect the health and safety of the public or in any important component part especially designed for such equipment or device. This includes reactors which are found to be of practical value and reactors for research and demonstration. In addition, the licenses for which the commission may require financial protection, but for which it is not made mandatory, that is licenses under Sections 53, 63 or 81, are for the licensing of special nuclear material, source material, and by-product material.

The "financial protection" required by Section 170 (a) is required by Section 170 (b) to be as much as the amount of liability insurance available from private sources except as otherwise established by the commission and may include private insurance, private contractual indemnities, self insurance, or other proof of financial responsibility, or a combination of such.

The "public liability" claims to be covered by financial protection are defined in Section 11 (u)[4] as any legal liability arising out of or resulting from a nuclear incident except workmen's compensation claims and claims arising out of an act of war.

Having stated the requirements of financial protection, the act then provides in Section 170 (c) for governmental indemnity in excess of that financial protection by stating that for all licenses issued before August 1, 1967, for which financial protection is required by the commission, the commission shall agree "to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 including the reasonable cost of investigating and settling claims and defending suits for damage. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity."

The act thus provides an enormous fund in the event of liability as the licensee will not only have "financial protection" in the amount of available liability insurance (except where a lesser amount is expressly permitted by the commission) but there will also be available up to $500,000,000 of governmental indemnity in excess of this financial protection. Further, the persons protected by the governmental indemnity cover an extremely broad category. The "persons indemnified" by the $500,000,000 governmental indemnity are defined in Section 11 (r)[5] to mean "the person with whom an indemnity agreement is executed and any other person who may be liable for public liability."

According to the Congressional committee report this definition of the person indemnified was suggested by insurance companies to avoid pyramiding of insurance at a reactor. This pyramiding could result from having each of the designers, owners, contractors and others interested in the reactor taking out separate policies of insurance. With the broad definition, in the case of a licensee of a reactor, the indemnification not only extends to the licensee but also to such persons as sub-contractors of the licensee, including those responsible for the design and construction of the reactor and supplying of parts. The committee expressly says that this definition of "persons indemnified" was not meant to be limited solely to those who may be found to be liable due to their contractual relationship with the licensee but is to cover unusual incidents such as a nuclear incident resulting from the negligence of an aircraft in crashing into the reactor thereby causing damage to the public.

Next, the Congress in Section 170 (d) of the act authorizes the commission to treat its own contractors in the same way it can treat licensees, but it is not required to do so.

Having provided that the governmental indemnity cannot exceed $500,000,000 for any one nuclear incident, the Act, in Section 170 (e), limits the liability of "persons indemnified" to the governmental indemnity and financial protection required and provides that if the public liability from a single nuclear incident will probably exceed this limit of liability, the commission or any person indemnified may apply to the appropriate United States district court

[4] 42 U.S.C., Sec. 2014 (u).

[5] 42 U.S.C., Sec. 2014 (r).

for an order limiting the liability of the persons indemnified and apportioning the payment of claims.

Of special interest to private insurance organizations is Section 170 (g) which requires that in administering the provisions of Section 170 the commission shall use "to the maximum extent practicable the facilities and services of private insurance organizations and the commission may contract to pay a reasonable compensation for such services."

This September, 1957 amendment to the Atomic Energy Act of 1954 provides financially adequate and broad protection where protection is given, but such protection is required for only certain types of activities —those for which it is believed the type of nuclear incident would be most likely to cause extensive damage. "Financial protection" is not required for many phases of the atomic energy industry and the $500,000,000 governmental indemnity applies only where this "financial protection" is required by the Act and the commission.

While the Price-Anderson Act focused attention upon private liability insurance for the "financial protection," insurance against radioactive hazards had previously existed. Long before the atomic bomb, casualty insurance companies had been insuring the liability of persons using radium and x-rays. For several years prior to the 1954 act, such companies had been insuring persons transporting or making use of radioactive isotopes for industrial, research and therapeutic purposes and persons furnishing services, materials and equipment to nuclear facilities operated by the government. Since the 1954 act stock and mutual insurance companies have developed pools for liability and property damage insurance of those in the atomic energy industry with particular reference to reactor operators. One of the purposes of this insurance offered by these pools is to provide the "financial protection" required by the Price-Anderson Act.

Recently the AEC has indicated that it anticipates soliciting in the near future public comments on whether the standard nuclear energy liability policies offered by the insurance pools should be approved by the commission as constituting financial protection. But other than this power exercised by the commission over "financial protection" for those activities where "financial protection" is required, private insurance companies do not have their liability insurance policies subject to control by virtue of the Atomic Energy Act.

With the increasing growth of the atomic energy industry placing more and more people in positions of possible injury, especially by radiation, certain problems of limitations, theory of liability, and immunity to suit will become emphasized and may result, in some instances, in legislative action. These are matters to be decided by applicable state—not federal—law for the legislative history[6] of the Price-Anderson Act expressly states that the rights of injured third parties are to be established by state law even where governmental indemnity exists.

Nearly all states have provisions limiting the period during which suit may be brought with the period of limitations beginning to run in some instances from the date of the injury regardless of whether or not there is knowledge of the injury, and in other instances from the date the person should have known of the injury. Where there is the possibility of injury due to explosions, such as of a reactor, such an incident is one that would not need any different treatment with regard to the statute of limitation than a typical industrial accident. The principal limitation problem created by the atomic energy industry is believed to be the radiation hazard which is insidious for several reasons including that the fact of and extent of exposure to radiation are often difficult to determine, the manifestations of harm may be delayed, and the extent of harm is difficult to determine. With radiation a person may not know for a long period of time that he or certain of his property, such as livestock, has been exposed to radiation or to radiation sufficient to be harmful.

Because of these characteristics of radiation caused injury there is agitation for state legislation to make statutes of limitation more "realistic" by abolishing those statutes which have the limitation period begin to run when the injury occurred and have them supplanted by limitation periods which begin when the injured party knows or should have known of the injury.

Normally a party is liable for damages or injury only when caused by the fault of

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[6] 1957 U. S. CODE Cong. and Adm. News, pp 1803 et seq.

that party, but it is well recognized that in certain types of activity liability without fault is imposed. The legislative history of the Price-Anderson Act not only states that the rights of injured third parties are to be established by state law but it also reflects a rather unusual circumstance. It reports that the problem of liability was a "major roadblock" to the development of a private reactor program and it was for the twofold purpose of (1) providing those in the atomic energy industry with protection against liability and (2) protecting the public by means of providing funds for the payment of claims that the Price-Anderson Act was passed.

It is now being strongly urged by some that absolute liability by legislation should be applied in the event of a nuclear incident, otherwise, they argue, the avowed purpose of providing the public with a source of funds where there is governmental indemnity would be often defeated by problems of proof. For example, after a major incident it might be impossible to prove that there was fault or who was at fault. The argument made for legislation imposing this burden rather than court decisions is that these persons believe the decisions will probably create such liability but the injured parties should have this clarified prior to trial rather than after the delays necessarily attendant to court proceedings.

Without arguing the merits of such approach, it is not believed that those urging such legislation seek it for all phases of the atomic energy industry. The argument is strongest when applied to those activities for which governmental immunity and financial protection are required. But what of those who use radioactive isotopes in medicine or as tracers in industrial operations? No major incident can be foreseen from such operations. Surely the cloak of absolute liability would not be all embracing.

State owned colleges and universities are owners and operators of a sizeable portion of the reactors and such institutions and charitable institutions normally enjoy an immunity from tort liability. Recognizing the existence of this immunity the Act of 1954 as amended by the Price-Anderson Act provides in Section 170(a) that the commission may require as a condition of issuing a license, that an applicant waive any immunity from liability conferred by federal or state law. However, the AEC reported March 28, 1958 to the Joint Committee on Atomic Energy on Operations under Section 170 of the Atomic Energy Act of 1954, that it had not exercised its authority to require waiver of immunity from tort liability as a condition for licensing federal or state agencies because such action could have resulted only in the suspension of those licenses and the shutting down of the reactors involved. Many of these agencies have no authority to waive their immunity and no authority to contract for liability insurance. Recognizing this gap in the public protection intended to be supplied by the Price-Anderson Act there has been proposed certain legislation to close a major portion of it. Identical bills (S. 4164 and H.R. 13455 introduced July 21 and 18, 1958, respectively) propose amendments to Section 170 of the Atomic Energy Act of 1954. By these bills "nonprofit educational institutions" are exempted from the financial protection requirements, but for such exempted licensees the commission is required to indemnify the licensee "and other persons indemnified as their interests may appear, from public liability arising from nuclear incidents" up to $500,000,000. By this proposed amendment there would be governmental indemnity for nonprofit educational institutions even though no "financial protection" and the indemnity would apply to all "public liability" and not merely that in excess of "financial protection."

From the foregoing portions of this article it can be seen that even though the federal government has close control of certain phases of the atomic energy industry, there remains open to insurance companies virtually unhampered freedom of contract for liability insurance except as to the form of policy where the Atomic Energy Commission requires "financial protection," that the procedures for proving or disproving liability in the case of a "nuclear incident" are not controlled by federal law except as to the limitation of liability in the remote possibility of the $500,000,000 governmental indemnity being exceeded, and that certain problems of limitations, theory of liability, and immunity to suit, while not unique, have become and will be in the future more emphasized.

What and When Of Atomic Liability

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Basic Scientific Facts

CERTAIN BASIC scientific facts involving the atom and its composition should be established and considered by all lawyers and the general public so that a familiarity with terminology can be achieved before treating with the subject of this paper.

A premise upon which an understanding of the atom can be based begins with Benjamin Franklin and his suggestion of positive and negative electricity. Negative electricity is made up of substances called electrons, while substances of positive electicity are called protons. In each atom, we find contained at least one proton and one electron. Other atoms contain many more protons and electrons, which combined together make up the separate entities known as atoms. The number of protons in any given atom gives us the atomic number of the element.

Asimov, in his most interesting book, "Inside the Atom", points out on Page 21 that a proton weighs as much (or is as heavy) as 1,837 electrons, so that a proton has as much mass as 1,837 electrons. Also, he writes that it takes 260,000,000,000,000,000,000,000,000 (two hundred and sixty heptillion) protons to make up a pound of mass.

However, since it is foolish to work with such numbers, scientists call the mass of a proton as 1. Thus, the masses of atoms are expressed according to a comparison with the mass of a proton. Atoms, therefore, can have mass numbers from 1 to over 250.[1] this number gives us the atomic weight of the atom.

Even though the electron's mass is 1/1837 of the proton, it carries the same amount of electricity. The electric charge of the proton is +1, and the electric charge of the electron is −1. Since electrons are lighter than protons, the electrons tend to move easily from substance to substance, and in this way negatively charge substance, while the substance deserted by the transient electrons becomes positively charged. The accumulation of such electricity is called "static" electricity, while the use of a stream of moving electrons to give light and heat becomes known as electric current.[2]

Now, to further understand the composition of the atom, we must consider the neutron. This third substance, usually making up the atom, was not discovered until 1930. The neutron, unlike the proton and electron, contains no electric charge. It is "neutral". The neutron has almost the same mass as a proton; so its mass number is 1 also.

Everything in our world is made up of these three substances: protons, electrons, and neutrons. The manner in which these substances are arranged within the atoms determines the different types of atoms we find in the world.[3]

The nucleus of an atom, in most cases, is formed by protons and neutrons, while the electrons move around the nucleus. Stable atoms are composed of an equal number of protons and electrons going to make electrical equilibrium. Neutrons, being "neutral", thus do not affect this equilibrium. However, when too many protons and neutrons are crowded into an atom's nucleus, it becomes unstable. When an atom becomes unstable, it gets rid of these irritating protons and neutrons in the form of various types of radiation, all of which are harmful to human tissues.[4]

The chemical properties of an atom depend upon the number of electrons orbiting about the atom's nucleus. Thus, since the electrons balance the protons, the atoms with the same atomic number react chemically in the same manner. However, other atoms may be balanced by electrons and protons and yet have a different number of neutrons in the nucleus; these atoms are designated as isotopes of the

Editor's Note: The Casualty Insurance Committee is preparing a series of articles dealing with "The problems of Atomic Energy Liability" which will appear in early issues of the Journal.

*Of the firm of McNeal & Schick.

[1]Inside the Atom—Isaac Asimov, Pg. 21.

[2]Inside the Atom—Isaac Asimov, Pgs. 22-24.

[3]Inside the Atom—Isaac Asimov, Pgs. 24-26.

[4]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pg. 2.

particular chemical element.[5] They are brothers and sisters of the same element.

As has been indicated, the chemical properties of an element depend upon the number of electrons in the atom. These electrons are believed to be in shells revolving about the nucleus. The outer shell of every element usually has a maximum number of eight electrons. Thus, since most rare gases, except helium, have eight electrons in their outer shell, they will not combine with other substances. But since the inner shells of elements can be expanded to more than eight electrons, we can develop transition elements and rare earths.[6]

We also find that when an atomic nucleus has more than twenty protons, a greater number of neutrons is required to achieve stability. Thus, bismuth (most massive stable atom) has eighty-three protons combined with one hundred twenty-six neutrons to maintain stability. When the nucleus contains more than eighty-three protons, there is no longer any stability, no matter how many neutrons are available.[7]

Hydrogen is the simplest of the elements since it has only one proton and one electron. It has no neutron. The heaviest naturally occurring element is uranium with an atomic weight of 238 (92 protons plus 146 neutrons) and the atomic number of 92. Heavier elements have been produced by scientists, such as Californium (98 CF 244), Einsteinium (99 E 253), Fermium (100 Fm 256), Mendelevium (101 Mv 249), and Nobelium 102 ? 253). These artificial elements are unstable. However, isotopes of elements ending in the numbers 34, 36 or 38 are usually stable isotopes for many years.

Atoms associate with one another in groups. The groups of atoms are called molecules. For example, the molecules of air usually contain two atoms each. Molecules of our body are made up of great numbers of atoms. Molecules are always in motion, even in what appears to be solid matter. Thus, with this constant movement (accelerated by heat) molecules strike other molecules repeatedly. In some instances the molecules remain unchanged, but in other cases, the molecules are changed as a result of gaining or losing atoms; i.e., iron rusting, powders going into solution, hydrogen exploding, and the like. These reactions are the chemical reactions of molecules upon molecules. Thus, we can prove that atoms having the same number of electrons will react over and over in the same manner.[8] Therefore, atoms with the same atomic number will perform alike, whereas atoms with different atomic numbers react differently.

As has been pointed out, an unstable nucleus brings about and results in harmful radiation. This struggle within the atom for stabilization causes (1) alpha emission, (2) beta emission, (3) positron emission, and (4) K capture. The stabilization process also causes the production of gamma rays and the throwing off of neutrons on matter bringing about harmful radiation to humans.[9]

The Curies, upon discovering radium about 1895, soon found, with Bacquerel, another French scientist, that the radium emitted three types of rays, namely: Alpha, Beta and Gamma, as they were named by the Curies. They found upon creating an electromagnetic field, the beam of rays from radium splits up into the three rays, with the alpha rays consisting of positively-charged helium nuclei, the beta rays being negatively charged electrons, and with the gamma rays not being deflected and resembling waves similar to those of the X-ray. Thus, radioactivity.

The alpha rays have a mass number of four consisting of two protons and two neutrons, just as in the nucleus of helium-4.

The beta rays are produced when a neutron inside the nucleus is changed to a proton, thus causing an unbalance and the throwing off of an electron which makes up the beta ray.

When the nucleus throws out both alpha and beta rays, the particles left in the nucleus rearrange themselves to become stable. In working out the stabilization, the gamma rays are thrown out as a result of the energy changes taking place in the nucleus.[10]

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[5]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 2-3.

[6]Atomic Energy in Medicine—K. E. Halnan, Pgs. 7-11.

[7]Inside the Atom—Isaac Asimov, Pg. 59.

[8]Inside the Atom—Isaac Asimov, Pgs. 34-35.

[9]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pg. 4.

[10]Inside the Atom—Isaac Asimov, Pg. 63.

Positron emission results from attempts at stabilization also. This phenomenon occurs when there is an excess of protons in the nucleus. A positron is formed when a proton attempts to stabilize the atom by turning into a neutron. If there is enough energy in the nucleus to permit this change, a positron is thrown out with no change in the atom, but with the loss of a positive charge.

When there is not sufficient energy to throw out a positron, the atom stabilizes by K capture. This occurs when the extra proton captures electron. The first electron shell is known as the K orbit and the second is called the L orbit. Generally, the electron is captured from the K orbit but sometimes the electron comes from the L orbit. The combination of the extra proton and captured electron creates a neutron.

When positron emission or K capture happens within the atom, we usually find that gamma (energy) rays are given off.

Neutrons also are producers of injuries from radiation. Neutrons have enormous penetrating power and render other substances radioactive.

These changes and emission of rays are known as radioactive decay of the atom.[11]

Injuries result from atomic radiation by ionization effects upon tissues and materials. Ions are known as atoms or molecules of atoms in an electrically excited state. Ions are created when stable atoms or molecules gain or lose an electron. Thus, we find both positive and negative ions. An alpha ray results from an atom of helium losing two orbital electrons, leaving a positive helium ion with two units of charge. The resulting positive ion and free electron is called an ion pair. A negative ion is formed when an atom or molecule picks up an extra electron from another atom or molecule. The resulting negative and positive ions are also called ion pairs. Injury potentials of radiation are measured by the number of ion pairs created by the rays passing through given materials or particular tissues.[12]

While we refer to the alpha and beta emissions as rays, they are really particles given off rather than true rays because they have mass. A true ray is that known as the gamma ray. It is not electrically charged as are the alpha and beta particles. These gamma rays have (1) a photoelectric effect as a result of the transferring of energy to the electron ejected, which in turn acts as a beta particle, which in turn brings out the giving off of X-rays of low energy; and (2) may also bring about the Compton effect whereby the gamma ray collides with an electron and part of the gamma ray energy is given to the electron; and finally (3) the gamma ray may bring about the creation of a pair when the energy photons pass near enough to the nucleus of the atom so that the photon is absorbed and an electro-positron is created. This causes the pairs to travel forward and the penetration power is great.[13]

The alpha and beta particles do not have great penetrating power, whereas gamma rays and neutrons do have great penetrating power.

Neutrons have mass and are therefore referred to as particles. They do not ionize directly, but do so indirectly by causing alpha and beta particles and gamma rays to be given off, which in turn ionize bringing about serious injuries, as will be described below.

Neutron absorption is particularly harmful to human beings because our bodies are high in hydrogen content. Thus, our tissues are neutron hungry and readily absorb neutrons. The absorption of neutrons causes both a slow or thermal reaction and a scattering reaction as the result of fast traveling neutrons coming into contact with the atom, bringing about a transferral of energy and the production of gamma rays.

In either case, the neutrons bring about the (1) ejection of alpha particles, (2) emission of gamma rays, (3) ejection of a proton, or (4) fission of the atom into two or more parts.[14]

In the most instructive book by K. E. Halnan, M.D., entitled Atomic Energy in Medicine, the following paragraphs ap-

[11]Atomic Energy Technology—Stason, Estep and Pierce, (University of Micihgan Law School—1956), Pgs. 5-6.

[12]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pg. 8.

[13]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 10-11.

[14]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 8-13.

pear accurately describing the effects of radiation:

"The cell is, of course, the basic brick or unit of the human body or of any living organism; the function of any organ or the body as a whole is the sum of the function of its constituent cells. The cell consists of a small mass of protoplasm (living material) containing a nucleus, usually enclosed in an envelope or membrane. The diameter of a cell varies but an average could be about 20μ (microns or thousandths of a millimeter), and, while there are many unicellular organisms, the body obviously consists of a very large number of cells indeed. Every cell is derived from some pre-existing cell, by a process of division, and every nucleus similarly from a parent nucleus.

"The usual processes of division are known as mitosis and meiosis, processes in which the nucleus, especially, goes through several recognizable stages which help us to understand its structure. In particular, the division of the nucleus is into long threads of nucleoprotein known as chromosomes, each of which splits into two, lengthways, in mitosis, so that there is a constant number of chromosomes from cell to cell (46 or 48 in man). Meiosis is a special kind of division for the formation of human male or female germ cells, sperms or ova, in which a cell is formed containing only half the standard number of chromosomes, so that when a male and female germ cell combine together there is again the standard number. The chromosome mechanism explains the known Mendelian laws of heredity. The physical entity corresponding to each heriditable character is a gene, a small portion of a chromosome. Changes in the genes can lead to permanent transmissive changes in the character of the organism known as mutations.

"One of the first observations made in radiobiology was that the cells most sensitive to radiation are those that are dividing and are immature. Small doses of radiation can be seen to cause breaks and other changes in the chromosomes. The more severe changes are not repairable and may cause mutations. Some of the mutations are not compatible with life. Higher doses of radiation will kill cells by damage to the protoplasm as a whole and not just to chromosomes. As in the case of chromosome breaks, repair can sometimes take place in the damaged cell itself; more often repair of radiation injury occurs by replacement from proliferation of undamaged cells.

"The whole process can easily be observed in the skin. The first effect, expilation, was seen for the first time in April, 1896, by an American professor. He attempted to demonstrate a metallic foreign body in the head of a colleague, and therefore gave a long exposure because of the low penetration of the X-rays then in use. Twenty-one days later both the operator and the subject were astonished to find that all the hair in the exposed area was dropping out. At this level of dosage (a single exposure of about 600 r) there will also be a temporary flushing, only, of the skin, and at a higher level (about 800 r upwards) one will begin to see the typical reddening called skin erythema. This comes after a ten to twenty-eight day latent period, and represents the widening and growth of blood vessels in the skin, to help resistance to, and repair of, radiation damage. This degree of skin erythema was widely used as a unit of radiation dosage before the roentgen and better methods of calibration were possible. Heavier doses will cause the formation of a darker red reaction and there will then be simple peeling of the skin. Still higher levels will lead to an even darker red to purple skin under which tiny blisters will begin to form, gradually coalescing and increasing in size. The blisters eventually break and leave a raw pink surface oozing clear yellow fluid. All these levels of skin reaction will heal slowly, but satisfactorily, over a few weeks but will usually leave some permanent effects, pigmentation (a brown skin) or telangiectasis (a multiplex of fine blood vessels visible in the skin). Even larger amounts of irradiation may leave a permanent ulcer which will not heal, necessitating cutting out the damaged area and replacement by a graft of skin from elsewhere by plastic surgery. The skin is so radiosensitive because it is one of the most rapidly growing parts of the body—the skin is exposed to more

wear and tear and therefore needs frequent replacement.

"The two other parts of the body that are rapidly growing and radiosensitive are the bone marrow and the generative organs. Most of the blood cells are formed in the bone marrow and then live in the blood stream for periods of a few days to several weeks. The immature white blood cells are the most sensitive and are easily destroyed. The white blood cell count (in cells per cubic millimetre in a sample of blood obtained by pricking the finger or ear) can almost be used as an index to the total amount of radiation received by the body. A weekly or more frequent blood count, for instance, is usually performed on patients having a course of X-ray treatment, and a monthly or three-monthly blood count is often done on radiologists and radiographers who may be receiving too much radiation. The red blood cells are also affected, but more slowly than the white cells.

"Both the male and female generative organs are highly proliferative. The testic produces millions of spermatozoa every week from puberty onwards, and the ovaries discharge at least one complete ovum (although many more are formed) every month of a healthy woman's life for the whole of the reproductive period—say from thirteen to forty-five years of age. Both these organs are very radiosensitive and sterility, with absence of menstrual periods, is a biological effect of radiation. The sterility may be either temporary or permanent, depending upon the level of radiation and the age of the person irradiated. Diagnostic X-rays should never cause sterility, even when the generative organs are included in the area exposed. Radiotherapy, however, may sometimes have to be given in such a way that sterility may be a result. This is generally when high doses are needed to treat adjacent cancer. Radiation treatment of other conditions, such as arthritis, is usually planned so that sterilizing doses will not reach either the testes or the ovaries. Irradiation of these organs to lower levels may be highly dangerous to future generations, mutations may be caused by damage to genes and chromosomes.

"Other tissues of the body are similarly affected by radiation. In each case there are three levels of radiation:

1. Insufficient to cause any perceptible damage at all.
2. Enough to cause obvious temporary damage which can be adequately repaired by undamaged cells.
3. A level so high that permanent irreparable damage is caused."

"Radiation sickness is another biological effect sometimes encountered. It is difficult to study because radiation is only given to ill patients and many of the symptoms are similar to those that can be caused by anxiety or worry, about either the illness or the treatment. There is no doubt that true radiation sickness does exist. The symptoms are loss of appetite, nausea, vomiting, diarrhoea, headache, giddiness, insomnia, and general malaise or asthenia (the last two words are used by doctors when the patient says he feels 'b— awful'). These symptoms come on a few hours after a high radiation dosage, especially if delivered to a large volume of the body. They are not experienced by most patients undergoing treatment except sometimes in the form of loss of appetite, because most courses of treatment are only given to a limited region of the body and the treatment is fractionated over some weeks so that each single day's treatment is at a relatively low dose level. Radiation sickness is most clearly seen in people exposed to lethal doses of radiation by accident. Incidents of this kind have occurred in the United States of America and in Russia, but not in this country. The best described incident, which was at Los Alamos, involved accidental irradiation of ten people. Two of them received lethal doses (400-600 r to the whole body) and died nine and twenty-four days afterwards. They both suffered from radiation sickness within one hour of the accident and became severely ill one week later. Only one of the other eight people had any radiation sickness at all."

Also, Glasstone, in his fine book, Sourcebook on Atomic Energy (1950), at page 502, has written the following paragraph:

"Unfortunately, the animal body has not developed an instinctive defense

against radiation as it has against heat and, to some extent, against ultraviolet light. Consequently, there can be severe radiation damage without any realization at the time on the part of the subject. The nature and extent of the symptoms which develop later may vary with the individual. They depend on the type of radiation, on the depth to which the radiation has penetrated, on the extent of the body exposed, on the amount of radiation absorbed, and also upon whether the exposure was chronic, that is, repeated or prolonged so as to lead to a cumulative effect, or acute, that is, received in one large dose. All types of excessive exposure appear to have one factor in common: there is invariably a delay, which may be weeks, months or years, before the final, and worst, effects become apparent."

Finally, one must give consideration to radioactive half life and permissible amounts of radiation before discussing the problems arising in the field of negligence as a result of atomic energy activities.

As has been discussed, all unstable atoms or molecules strive for stabilization. The emission of protons, electrons, or positrons in the process of radioactive decay leads to the term "half-life", which means the time it takes for one-half of the radiation activity to decay. The half-lives of isotopes vary from about one millionth of a second to that of billions of years. It is necessary to know the half-life (radioactive) of a given isotope to accurately chart the amount of radiation which will be received by the tissues or other substances. The length of exposure times the rate of the half-life determines how much radiation has been received in the individual case. To cite an example, the half-life of uranium-238 is four and a half billion years. Thus it takes four and a half billion years for half of the uranium to decay. Then, it takes four and a half billion more years for half of the half remaining to break down so that actually all the uranium is never lost because it keeps decaying by halves as is indicated. By way of contrast, francium-223 (discovered 1940) has a half-life of twenty-one minutes, yet there are still small quantities of francium in existence.[15]

It should be noted also that it takes a larger quantity of a slowly decaying substance to give off one curie (number of nuclei decaying in one second in a gram of radium) of radiation in a given period than it does with a fast decaying isotope.[16]

Another term important in the consideration of atomic energy activities is the roentgen. The roentgen is the amount of X-ray or gamma ray radiation that will create in a given amount of dry air at standard temperature and pressure, ion pairs carrying a given quantity of electricity.[17]

The dosage rate is the amount of roentgens absorbed in a given time. Roentgens vary with intensity of source as well as with the amount of material in the source. Also, the amount of energy absorbed per roentgen varies with the kind of tissue or material involved,[18] as has been indicated above in the quotations from the book, Atomic Energy in Medicine, and from Glasstone, *supra*.

Also, as has been pointed out, there is a difference in susceptibility to energy among individuals, as well as among age groups. It has been determined that a dose of 400 roentgens is probably a fatal dosage for about 50% of our population. The dosage of 400 roentgens is contemplated as a radiation for the whole body as opposed to exposure of a portion of the body. It has been determined that when only particular tissues or portions of a body are exposed, that even as much as 5,000 roentgens can be used without fatal results, inasmuch as this radiation is concentrated over a small area for the purposes of destroying deceased and malignant growths.

It has also been determined that exposures have a cumulative effect so that it is most necessary that all humans be particularly careful concerning the amount of radiation absorbed in any given period. It has been determined that 0.3 roentgens per week can be absorbed without injurious effects. However, the problem of radiation exposure becomes complex and of considerable importance in the handling of personal injury cases involving radiation injuries because of the

[15]Inside the Atom—Isaac Asimov, Pgs. 82-89.

[16]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 16-17.

[17]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pg. 17.

[18]Atomic Energy Technology, Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 17-18.

quality and quantity of exposure in a given period of" time as it applies to a specific individual, or specific group of individuals.

With the above rather superficial background of explanation relating to the atom and radiation, it is believed more understanding of the problems confronting the negligence lawyer as to claims of injury and damages arising from the development of uses of atomic energy will be achieved.

The pressurized water reactor located at Shippingport, Pennsylvania, begun in July of 1956, is presently getting into production. This step forward serves to point up the problems which undoubtedly will confront lawyers devoting their time and energies to tort law.

Statutory Enactments

Senator Clinton P. Anderson in an address before the Northeastern Regional Meeting of the American Bar Association at Hartford, Connecticut, on April 16, 1956, posed these questions:

"1. How do you prove or disprove negligence in the atomic energy industry if the operations are shrouded in secrecy?

"2. If radiation damage appears, how do you prove which of several possible radiations caused the damage?

"3. If radiation damage appears after a long period of time and you can prove where the damage came from, how do you collect of (sic) the organization responsible is no longer in business?

"4. If radiation causes damage to the genes in a parent, to whom does the right of action belong—the parent or the deformed child?

"5. If it takes an Einstein to understand the theory of relativity, how can a jury decide whether a reactor is run negligently or carefully?"

These well thought through questions of Senator Anderson undoubtedly had some effect upon Congress in considering amendments to the Atomic Energy Act of 1954. We find that as of September 2, 1957, Public Law 85-256, (71 Stat. 576), provides, among other things, the following:

"Section 3. Section 11 of the Atomic Energy Act of 1954, as amended, is amended by adding thereto the following new subsections, and redesignating the other subsections accordingly:

"j. The term 'financial protection' means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

"n. The term 'licensed activity' means an activity licensed pursuant to this Act and covered by the provisions of section 170 a.

"o. The term 'nuclear incident' means any occurrence within the United States causing bodily injury, sickness, disease, or death, or loss of or damage to property, or for loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

"r. The term 'person indemnified' means the person with whom an indemnity agreement is executed and any other person who may be liable for public liability.

"u. The term 'public liability' means any legal liability arising out of or resulting from a nuclear incident, except claims under State or Federal Workmen's Compensation Acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs, and except for claims arising out of an act of war. 'Public Liability' also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs."

Sec. 4. The Atomic Energy Act of 1954, as amended, is amended by add-

[20]Atomic Energy Technology—Stason, Estep and Pierce, (University of Michigan Law School—1956), Pgs. 17-19.

ing thereto a new section, with the appropriate amendment to the table of contents:

" 'a. Each license issued under section 103 or 104 and each construction permit issued under Section 185 shall, and each license issued under section 53, 63, or 81 may, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with subsection 170 b. to cover public liability claims. Whenever such financial protection is required, it shall be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection 170 c. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

" 'b. The amount of financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (1) the cost and terms of private insurance, (2) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (3) the nature and purpose of the licensed activity: *Provided,* That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of financial protection required shall be the maximum amount available from private sources. Such financial protection may include private insurance, private contractual indemnities, self insurance, other proof of financial responsibility, or a combination of such measures.

" 'c. The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1967, for which it requires financial protection, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity.

" 'd. In addition to any other authority the Commission may have, the Commission is authorized until August 1, 1967, to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in the amount of $500,000,000 including the reasonable costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident. The provisions of this subsection may be applicable to lump sum as well as cost type

contracts and to contracts and projects financed in whole or in part by the Commission.

"'e. The aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage, shall not exceed the sum of $500,000,000 together with the amount of financial protection required of the licensee or contractor. The Commission or any person indemnified may apply to the appropriate district court of the United States having venue in bankruptcy matters over the location of the nuclear incident, and upon a showing that the public liability from a single nuclear incident will probably exceed the limit of liability imposed by this section, shall be entitled to such orders as may be appropriate for enforcement of the provisions of this section, including an order limiting the liability of the persons indemnified, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, orders permitting partial payments to be made before final determination of the total claims, and an order setting aside a part of the funds available for possible latent injuries not discovered until a later time.'"

Thus, it can be understood that Public Law 85-256 of September 2, 1957, provides for the federal government to indemnify any person found liable for an atomic incident when the losses are in excess of the coverage afforded by private carriers of insurance. In this manner private industry and the public are protected and encouraged to become interested in the projects underway and to be started in the United States.

Under the Atomic Energy Act of 1954, Congress has placed upon the Atomic Energy Commission the responsibility for licensing and regulating private activities in this field; and has also made the Commission responsible for the protection of health and safety in all atomic energy projects and operations. This certainly will promote public confidence and acceptance of the pioneering work now underway. The pertinent regulations are set out as follows:

10 CFR Part 20—Standards for Protection Against Radiation, effective February 28, 1957.

10 CFR Part 30—Licensing of Byproduct Material, effective February 10, 1956.

10 CFR Part 40—Control of Source Material, effective March 31, 1947, with amendments from time to time.

10 CFR Part 50—Licensing of Production and Utilization Facilities, effective February 18, 1956.

10 CFR Part 55—Operators' Licenses, effective February 3, 1956.

10 CFR Part 55—Operators' Licenses, effective February 3, 1956.

10 CFR Part 70—Special Nuclear Materials Regulations, effective March 4, 1956.

10 CFR Part 140—Financial Production Requirements and Indemnity Agreements, effective September 11, 1957.

Insurance Pools

In January, 1957, three combinations of private insurance companies were formed to provide insuranee for atomic energy activities. One group is comprised of stock companies and provides coverage against property damage on atomic energy facilities; another group composed of stock companies provides coverage for public liability; the third group is composed of mutual companies, and this group has agreed to provide both property and public liability insurance on atomic energy operations and facilities. The policies to be issued will provide coverage to the licensee of the plant, all suppliers of equipment and services, together with any others who might be liable in the event of injuries occasioned from the use or operation of atomic energy facilities.

Workmen's compensation insurance for atomic injuries can be provided now with the companies now writing this type of insurance, so this field of insurance coverage presents no problem as to giving protection to employees working in this field.

The problems confronting insurance underwriters appear to be whether present methods of handling claims and the payment of same in this field are adequate; what will happen concerning losses in an atomic catastrophe; what should be done to evaluate damage and potential damage; who should bear the liability; and, finally, what standard of negligence or legal liability will be imposed upon those responsible for any injuries sustained by the individual or public directly traceable to the use and operation of atomic energy facilities and products.

The La Porte Case

In considering the problem of liability, we are compelled to look at the landmark case in this field, which is *La Porte v. United States Radium Corporation,* 13 F. Supp. 263, decided December 17, 1935. Because this case is the basic case from which all decisions in the field of atomic energy must come, it is believed extensive quotations therefrom will be helpful in formulating certain conclusions arrived at after careful study of the problems presented or contemplated in the field of atomic liability.

The facts in the *La Porte* case, *supra,* are as follows:

> "Irene F. La Porte, the plaintiff's intestate, was employed by the defendant, the United States Radium Corporation, from May 14, 1917, to December 11, 1918, and for a brief period of not over six weeks in 1920.
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> "The decedent was employed to paint the dials of inexpensive watches with a luminous paint containing small quantities of the element radium in the form of a sulphate. While the decedent was in the employ of the defendant, no precautions were taken to prevent dial painters from being exposed to the small quantity of radium sulphate, an insoluble salt, and the radium emanation present in the air of their workrooms.
>
> "The decedent was one of eighty girls who worked for five and one-half days per week in a large factory room ventilated by a skylight and by windows around the room. The windows were regulated by any of the girls who saw fit to do so. They worked at four rows of tables extending practically the length of the room. Each girl worked a few feet away from the girl next to her and a few feet away from the girl at the opposite side of the table. Each girl procured a tray containing twenty-four watch dials and the material to be used to paint the numerals upon them so that they would appear luminous. The material was a powder, of about the consistency of cosmetic powder, and consisted of phosphorescent zinc sulphide mixed with radium sulphate. This compound was contained in a small vial about an inch and one-half long and about the size of an ordinary lead pencil in diameter. The powder was poured from the vial into a small porcelain crucible, about the size of a thimble. A quantity of gum arabic, as an adhesive, and a thinner of water were then added, and this was stirred with a small glass rod until a paint-like substance resulted. In the course of a working week each girl painted the dials contained on twenty-two to forty-four such trays, depending upon the speed with which she worked, and used a vial for powder for each tray. When the paint-like substance was produced a girl would employ it in painting the figures on a watch dial. There were fourteen numerals, the figure six being omitted. In the painting each girl used a very fine brush of camel's hair containing about thirty hairs. In order to obtain the fine lines which the work required, a girl would place the bristles in her mouth, and by the action of her tongue and lips bring the bristles to a fine point. The brush was then dipped into the paint, the figures painted upon the dial until more paint was required or until the paint on the brush dried and hardened, when the brush was dipped into a small crucible of water. This water remained in the crucible without change for a day or perhaps two days. The brush would then be repointed in the mouth and dipped into the paint or even repointed in such manner after being dipped into the paint itself, in a continuous process. Some girls painted an entire dial with a single pointing of the brush. Some re-pointed the brush after each numeral.
>
> "The evidence shows that the decedent was in good health at the time she left the employ of the defendant. In April, 1921, the decedent was mar-

ried to the plaintiff. Her health remained excellent up until the autumn of 1927.

"In the latter part of 1927 the decedent complained of a fear that she might have radium poisoning. She delayed visiting her dentist for some time because other persons who had radium poisoning had demonstrated symptoms similar to those from which she suffered. The decedent constantly associated with those persons who were suffering from the radium poisoning and frequently discussed its danger and symptoms with them, her husband, and sister.

"In the spring of 1928, the decedent had a tooth extracted that troubled her. She told her dentist that she had hesitated to go to him for fear that she might have radium necrosis. Her dentist reassured her, and for the time being she appeared to be in good health.

"From the latter half of 1928 to October 1930, she was treated by a doctor and she complained continually of pains in her face and jaw and frequently discussed radium poisoning. She was convinced that she was a victim. In October, 1930, she began to have pains in her legs and joints. Dr. Harrison S. Martland, the chief medical examiner of Essex county, N. J., determined that the decedent was a victim of radium necrosis on October 15, 1930. At that time Dr. Martland read X-rays taken of the decedent's jaws in 1925 as showing typical areas of radiation osteitis.

"On May 4, 1931, she first presented a claim for damages to the defendant.

"The decedent died June 16, 1931. Dr. Martland performed an autopsy and confirmed his diagnosis that the decedent had died of occupational radium poisoning (osteogenic-sarcoma of pelvis) in the watch-dial industry. Dr. Martland found radium deposited in the bone structure of the decedent."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from pages 264-265.

"It has only been established since 1924 or 1925 that the conditions under which the dial painters worked in 1917 and thereabout subjected them to a pernicious and frightful occupational hazard. The important factual question is to determine how much the scientific and medical world and the defendant knew about the industry at the time, or thereabouts, that the decedent's alleged cause of action arose."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from page 266.

"There is evidence in the literature that radioactive salts introduced in the body would be eliminated in part very slowly. Assuming that was established, it might be a fair inference, but surely not conclusive, that radium given in frequent doses was cumulative in its nature and effect."

"But it is difficult to understand how the defendant can be said to have perpetrated a fraud when it, a commercial enterprise, failed to draw inferences, which no doctor had ventured, to the effect that its industry was suicidal to its workers. It was a theory that radium would be deposited in the bones and there were proven cases of burns by X-ray and direct contact causing delayed external effects, but that does not lead to the conclusion that dial painters were doomed or even in danger as of the knowledge of 1920.

"On the contrary, in the early literature, numerous statements were made as to the beneficial effect of radium applied internally."

Le Porte v. United States Radium Corporation, 13 F. Supp. 263, from page 267.

"There is no question but that defendant was utterly ignorant of the harmful effects attendant upon its factory process until 1924, when its attention was directed to an alleged case of radium necrosis suffered by one of its former employees."

"The defendant instigated the investigations and evidenced a willingness to cooperate in them, demonstrating its effort to determine the cause of the harmful effect upon its workers as soon as its attention was directed thereto, and there is no suspicion upon which the court may rest to charge it with having knowledge of such cause or that it should, prior to 1924, have had such knowledge."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from page 268.

"But if the defendant is to be denied the protection of the statute of limitations, the plaintiff's case must be based upon the proposition that the defendant should have known of the harmful effects during the period from 1917 to 1920.

"If it is assumed that a cause of action existed in this case in favor of the decedent against the defendant, it must have accrued some time in the course of her employment in 1917, 1918, or 1920, at the latest, when she was last exposed to the radium. It is unnecessary, if not impossible, to determine the exact date. The question has not been raised, but, at any rate, if the action arose on the last day of her employment, the statute would have normally barred her remedy some time in 1922, which is at least two years before radium necrosis was discovered and over seven years before she was diagnosed."

"It is tempting in the light of the knowledge of today and the experience since 1920 to create the thought that the defendant must have been negligent in some way. Today, industrial methods which the defendant then employed would not be merely negligent but criminal. But it should be carefully noted that this case must be decided on the facts as they existed in the light of the knowledge of 1917 to 1920. Were safety measures such as scientific ventilation, masks, periodical medical examinations, abolition of brush pointing, and other now known precautions to be considered necessary as of 1920?

"Actually, the defendant and its research bureau failed to anticipate what later research and scientific investigation proved to be a fact, namely, that the defendant's dial painters in 1920 were exposed to the gravest of dangers in their occupation.

"The fact is that this experience was not brought home to science and medicine until a considerable number of cases such as that at bar had been considered and then the knowledge came slowly, only to be accepted as fact several years after the first necrosis cases were exposed."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from pages 271-272.

"It can be said that this is a case wherein both the plaintiff and the defendant were ignorant of the existence of facts which may have constituted a cause of action, the reason for it being the fault of neither. Medical and scientific knowledge had failed to discover the dangerous propensities of the occupation. The statute of limitations and its exceptions were not conceived for this extraordinary situation."

"Medical and scientific opinion concerning radium was going through changes, slow in process, which were the result of an increasing number of experiments. There is nothing on which a finding of negligence, in failing to discover the dangers in the industry, could be based."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from page 276.

"In 1925 and 1926, nation-wide publicity was given to the discovery of radium poisoning as the cause of the ailment from which several of these dial painters suffered. In the face of this and the direct statement by the decedent that she suspected that she, too, was a victim, her own doctor and dentist in 1927 were unable to diagnose her trouble. Under such circumstances, can her employer be charged with the responsibility of anticipating such dangers in the light of the learning of the years 1917 to 1920?"

"This is an extraordinary case even today. The statute of limitations was enacted for the purpose of protecting the public from fraud. Its ends were desirable and necessary, and in the infinite variety of cases that come before the courts that is still true. The responsibility in this case can only be laid to the tremendous progress made in science in the last four decades, for radium was unknown prior to 1898. The development of the law to meet such contingencies must of necessity lag behind their discovery. Only forward looking, intelligent legislation can protect future situations such as the one here presented."

La Porte v. United States Radium Corporation, 13 F. Supp. 263, from page 277.

The many quotations from the *La Porte* case, *supra,* were believed necessary to

point up the complex problems arising from atomic energy activities and any tort liability flowing therefrom. Certainly the *La Porte* case will be the "springboard" from which we will obtain any expanding negligence law in this new field of tort law.

Instead of the problems of tort liability becoming more clear, we find them becoming increasingly intricate with the passage of time. The increase of emphasis upon the use of atomic energy for peaceful advancement of the human race will probably bring about many more complexities in tort law as claims for injuries are made.

The Atomic Energy Act of 1954 brought these problems more clearly to the forefront since utilities were permitted licenses and entered into the competitive field of producing atomic energy for nonmilitary uses. Further, the extended use of radioactive isotopes in manufacturing and medicine has increased the importance of "knowing where we are going" in the tort liability field as far as atomic energy activities are concerned.

Problems of Liability

What are some of the present problems involved in the expansion of atomic energy activities for peaceful uses? Succinctly, the problems presently seem to be these:

1. Possibility (note—not probability!) of catastrophe resulting from explosion of a reactor, despite all known safety precautions having been taken. Necessary evacuation of cities and liability for injuries which could be the result of such an explosion or runaway.
2. Workmen's compensation problems and causal relationship, together with statute of limitation questions arising from radiation injuries and the knowledge of same.
3. Immediate and known injuries resulting from radiation. When to make claim or file suit.
4. Cumulative effects of radiation and difficulties of fixing liability upon responsible corporation, corporations or individuals, with side effects based upon idiosyncracies of the individuals sustaining such injuries.
5. Long term effects unknown to the individual involving mutation (genetic) dangers and results; together with proving causal relationship of various types of cancer and of leukemia, all of which will involve the probable application of the statutes of limitations applicable to tort liability in the various states.
6. Conflict of laws problems raised by migration of workers; and products of atomic energy being shipped in Interstate Commerce; as well as waste materials released in the air, water or ground.
7. Problems of express or implied warranties; and what safety precautions are to be taken and regarded as "standard"; as well as what "standard" of exposure is to be regarded as "safe" for all purposes taking into consideration the "average" man, the "hot" laboratory, the hospital, the power station, the university, and the factory.
8. Will contributory negligence and assumption of risk be defenses to claims of radiation injury?
9. Will the doctrines of "liability without fault", "res ipsa loquitur" or ordinary negligence apply to these cases?

The first question to arise concerning liability would seem to be directed at the Federal Government and its responsibility under the Federal Tort Claims Act, 28 U.S.C. sec. 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (1952). While the Atomic Energy Act of 1954 [Sect. 53 e (8),] 42 U.S.C. sec. 63 provides that licensees will be required to hold the Government and the Commission harmless from any damage resulting from the use or possession of nuclear material, this does not mean that the government will not be held liable for its negligence when it does not involve an act of discretion of an agency or employee of the government.

In this connection two cases considering the applicability of the Federal Tort Claims Act are worthy of mention.

The *Dalehite v. United States* case, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427, involving an explosion of ammonium nitrate in ships in the Texas City harbor, held that the exporting of fertilizer to Europe and the failure to take safety measures to protect the public from injuries from explosion were discretionary acts. The Supreme Court also rejected the

argument of liability without fault in said case. In this connection, the Supreme Court seems to be committed to the position that it will not allow the "liability without fault" doctrine to be considered in any case involving the Federal Tort Claims Act.[20]

The second case involves claims of damage to their herds by sheep owners as a result of nuclear tests conducted by the government in Nevada in 1952-53. The case is *Bulloch v. United States,* 133 F. Supp. 885, decided August 2, 1955, by Judge Christenson of the Utah District Court. The case is important because it involves a damage suit resulting from nuclear energy tests, and considers the discretionary clause of the Federal Tort Claims Act as it applies to questions of liability arising from atomic energy activities.

The court in considering the questions presented held as follows:

> "There can be no doubt that the determination of how tests are to be conducted, when they are to be conducted, and in what manner they are to be conducted, whether made at high or low level, as long as within the discretionary power granted by Congress to the Atomic Energy Commission, could not give rise to liability, notwithstanding how lacking in ordinary care or circumspection such determination might be."
>
> "The decision to make the test and the means involved as a matter of necessity or convenience may have been decided in the exercise of a proper discretion. Yet, because of inattention to the minimum requirements of ordinary care, no notice of an impending detonation may have been given to a herder whose flocks were in the area clearly to be affected. There may have been clear knowledge of the danger to the sheep. If the failure to give notice reasonably could be attributed to a discretionary decision at any level that such notice would be impractical or would interfere with the carrying out of the project or would involve wasted time without justification, the Court might not be permitted to weigh exercise of that discretion to see whether it comported with due care or was abused. However, if none of these or similar questions were involved, but without reference to any discretionary decision, damage was caused by a negligent failure to do what ordinary care would require, I cannot but think that a case might thus be presented on which relief could be granted under the Tort claims Act."

Bulloch v. United States, 133 F. Supp. 885, from pages 888 and 889.

"The Government argues that the 'claims of the plaintiffs against the United States are based upon the performance of a governmental function and as such are excluded from the coverage of the Federal Tort Claims Act.' Most of this argument is based upon language in the *Dalehite* case which has been sufficiently noticed above. The rationals of the argument is that since nuclear experimentation is a governmental function, any act or omission in the course of such a project is excluded because this would be a part of the governmental function. In a sense, all activities of the Government are governmental functions. If their inherent nature in this respect is sufficient to exclude liability on the part of the United States, there would be few, if any, cases that could be brought under the Federal Tort Claims Act. As we have seen, the Dalehite case does not actually turn upon the question of whether the major activity is a governmental function. It refers to *acts* of a governmental nature or function. We must look to the nature of the acts or missions, themselves, rather than to the nature of the major project or undertaking in the course of which they occur."

"In Eastern Air Lines, Inc., v. Union Trust Company (United States v. Union Trust Company) D.C. Cir. 1955, 221 F. 2d 62, the Court commented that '* * * Discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently.' At page 77. In Sullivan v. United States, D.C.N.D.Ill. E.D. 1955, 129 F. Supp. 713, Judge Campbell, holding that the Government was liable for results of the negligent operation of a motor vehicle by an FBI agent pursuing a person where arrest had been ordered by the Department of Justice, commented: ' * * * if the activity at the opera-

[20] *United States v. Ure,* 225 F. 2d 709.

tional level was not performed in accordance with some plan or program, then the activity would not be discretionary and would be actionable.' At page 714. In Dahlstrom v. United States, D.C.D. Minn. 1955, 129 F. Supp. 772, recovery against the Government was denied but only because the case did not come within the recognized rule that ' * * * where the particular negligent act relied upon to establish liability is either a deviation from or simply not covered by the plan or schedule of operations decided upon in discharge of a discretionary authority, then the negligence, if proven, is actionable.' At page 776."

Bulloch v. United States, 133 F. Supp. 885, from pages 889, 890 and 891.

"The fact that an absolute liability under state law may be imposed against individuals for certain dangerous activities does not relieve the Government from liability under the Tort Claim Act where the negligence thereby required is established. United States v. Praylou (United States v. Walker), 4 Cir., 1953, 208 F. 2d 291, certiorari denied 347 U.S. 934, 74 S. Ct. 628, 98 L. Ed. 1085."

"The decisive question here, however, is whether every act in the course of the performance or execution of the nuclear tests was necessarily one involving the exercise of lawful discretion or judgment. I am of the opinion that this does not necessarily follow. In any event, the real question is the same as concluded above as far as this decision is concerned. Within the perimeter of the pleadings I believe evidence could properly be received of acts in the scope of employment of agents of the Atomic Energy Commission which would not involved discretion or judgment and which, thus, would not be excluded either as a basis of liability under the Tort Claims Act or as a basis of individual liability."

Bulloch v. United States, 133 F. Supp. 885, from 892.

"A further question has arisen in the course of my study, unargued by the parties—whether the provisions of Section 167 of the Atomic Energy Act of 1954, as amended August 30th, 1954, c. 1075, § 1, 68 Stat. 952, 42 U.S.C.A. § 2207, indicates an intention on the part of Congress that for all claims for property damage or personal injury resulting from any detonation, explosion or radiation produced in the conduct of the Commission's program for testing atomic weapons, there should be relief other than under the Tort Claims Act. This section authorizes the Commission, without the intervention of any court, to settle such claims for not more than $5,000 upon presentation within one year after the accident or incident giving rise to them.

"It might be contended with some reason that if the Tort Claims Act, including its provisions concerning administrative adjustments, had application to cases of damage caused by atomic explosions, there was no point in granting the Atomic Energy Commission this special authority, or that if it were granted such enlarged authority, an amendment to the Tort Claims Act would have sufficed. Nevertheless, I have concluded that this provision in the Atomic Energy Act is consistent with the intent and understanding on the part of Congress that under appropriate conditions action would lie by virtue of the Tort Claims Act for negligence arising in the course of the Commission's program of nuclear experimentation. The provision for administrative settlements by the Commission covers atomic explosion claims not maintainable under the Tort Claims Act. There is nothing inconsistent between the two provisions. Moreover, there is a provision in the Tort Claims Act itself permitting administrative settlements of claims not exceeding $1,000 against the Government based on negligence. 28 U.S.C.A. § 2672. The latter provision has not been supposed to have narrowed the kinds of claims which can be prosecuted in the courts under the Tort Claims Act. Nor should the provisions concerning administrative adjustments under the Atomic Energy Act have this effect even though settlements are authorized in increased amounts, not limited to cases of negligence. To expand the provisions for administrative adjustments in the Tort Claims Act to give the Atomic Energy Commission power to settle not only for the results of negligent acts in an increased amount, but for all other acts causing damage through detonation of nuclear devices, would have been

complicated and incongruous. This object was more conveniently accomplished by setting this authority out in the Atomic Energy Act. I am of the opinion that the provisions concerning administrative adjustments contained in the Atomic Energy Act do not preclude the maintenance of plaintiffs' suit before this Court."

Bulloch v. United States, 133 F. Supp. 885, from page 893.

Thus, we see a disposition on the part of the Utah court, at least, to permit evidence to be introduced in these cases against the government, when the facts indicate no discretionary power is being exercised and where there appears to be stated a cause of action against the government on the basis of negligent performance of duties in connection with atomic energy activities. Compare *Bartholomae Corporation v. United States,* 135 F. Supp. 651, (Cal. 1955), wherein the court adhered to the discretionary rule of the *Dalehite* case, *supra,* and refused to consider the liability without fault and res ipsa loquitur doctrines.

In considering these cases, and others, decided under the Federal Tort Claims Act, it is probable that the Supreme Court will adhere to the discretionary rule and the rejection of the absolute liability theory established in the *Dalehite* case, thereby making the plaintiffs' case against the government a difficult one to pursue in any action arising as a result of atomic energy activities.

The writer doubts very much if the doctrine of liability without fault will be advocated and followed by the courts in cases involving atomic energy activities in the United States. The foundation of this theory, of course, is one of social philosophy whereby society places the burden of bearing inevitable losses upon those best able to pay for the losses regardless of liability. This theory is particularly applicable where hazardous enterprises are involved, even though such enterprises are socially desirable and valuable to society in general.[21]

The doctrine first was given attention as a result of the decision in *Rylands v. Fletcher,* 159 Eng. Rep 737 (Ex. 1865), reversed 35 L. J. Rep., 154, affirmed L. R. 3 H. L. 330, 1 E. R. C. 236 (H. L. 1868) wherein Lord Cranword in 1 E.R.C. at page 260 wrote, "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." The case was discussed in some detail in Prosser, Law of Torts 329-336, and cases cited therein.

It is believed that while reactors are still thought of as potential danger spots, that education of the public will lead to a ready acceptance of them as instruments of social progress. They will eventually be regarded as necessary to our way of life.

The almost phenomenal safety record of the government in its operation of reactors forcefully argues against adoption of the liability without fault theory. During the time the government engaged in the operation of reactors for the years 1943 to 1954, there were no accidents involving radiation injury sufficient to cause lost time of personnel during some 606,686 operating hours and 17,799,000 man hours, with but two fatalities in accidents occurring in laboratories working with fissionable materials.[22] In fact, the accident rate in 1949 was 4.94 injuries per million man hours compared to 11.49 in the rest of the industry, according to Dean in his Law Review article, The Impact of the Atom on Law, 12 Pitt. L. Rev. 514 (1951). In the year of 1956, this phenomenal safety record was still being maintained. Most of the incidents involving radiation were of a minor nature. Breakdown of the incidents occurring from January 1 through December 31, 1956, will be found on pages 311-312 of the pamphlet entitled "Progress in Peaceful Uses of Atomic Energy", prepared by the United States Atomic Energy Commission and printed January, 1958.

Also it is suggested that if the burden of bearing losses is cast upon the operators of reactors, the costs of atomic energy products will be maintained at a relatively high level, thus retarding its ultimate expansion and use.

[21]Prosser, Law of Torts 332 (1955) and Restatement of Torts 519-520.

[22]Address of Clark C. Vogel, General Counsel of the Atomic Energy Commission before the Seminar in Control and Use of Atomic Energy. (March 27, 1956).

Further, in the very valuable pamphlet, Atomic Energy Technology, by Stason, Estep and Pierce, of the University of Michigan Law School (1956), there appears this thought-provoking paragraph on page 70:

"We have already seen that reactor operation, radiation sources, and the storage and disposal of radioactive wastes all involve unusual hazards that might be characterized as ultrahazardous in nature. We must ask ourselves many questions. What effect, if any, should be given to governmental approval of the operation as set forth in the form of atomic energy licenses? Should or does such approval preclude the courts from applying strict liability rules, particularly when the operation has been carefully inspected from the standpoint of health and safety by federal or state authorities? What is the effect of federal approval on state authority? Should liability be imposed for injuries to trespassers in view of the unique hazard? Should visitors and licensees be required to assume radiation risks? Should liability be imposed where an 'Act of God,' such as an earthquake or tornado, has caused injuries by spreading radio-activity throughout a community? Do workers 'assume risks,' such as possible genetic damage?"

Borrowing also from an article written in 1950 for the Insurance Counsel Journal for October by Col. Reuel C. Stratton, Supervising Chemical Engineer for Travelers Insurance Company, entitled, "Underwriting of Risks Within Plants of United States Atomic Energy Commission", these paragraphs appear:

"You will probably be interested because you will hear of hazards, knowing that radiation does things to people that isn't good for you, if you have too much, and yet we all submit to X-rays, which is a form of radiation, to realize in the history of this project which involves hundreds of thousands of lives over the period of years there have been only two fatal cases of radiation. Both of those happened in the Los Alamos laboratory in the early stages of the project and are comparable, in my opinion, to the loss of the same number of people in an ammunition plant for the Ordnance Department. They were war-time casualties. The number of cases of radiation burns which have happened is insignificant and is somewhere between 30 and 50.

"There have been, however, a number of cases, which I would like to call fake cases, reported in the newspapers. As a matter of fact, I recall very vividly my first coding visit to Oak Ridge in January, 1947, and one evening at the hotel they have there I started to pick up a newspaper and found a heading 'Nashville Woman Claims Atomic Tuberculosis', and it went on to tell how this person had been employed at Oak Ridge and now was terribly ill with atomic tuberculosis.

"Another case that came to the notice of the newspapers was a chap who was picked up by some member of the medical profession in Texas terribly ill and diagnosed as radiation sickness because in his history he told how he had worked at Oak Ridge.

"A review of these cases, however, showed neither of the individuals ever worked in the part of the plant where they could come in contact with any more radiation than you have right here, but yet, because they had worked in the plant, therefore, any ill which beset them, of course, had to come from an exposure to radiation."

"In all probability—and this is interesting from the legal standpoint—in all probability the A-bomb project is the first and only industrial project which thought about health protection while they were thinking about the building of the manufacturing process. In other words, so far as I know it is the only case where an industrial health program was ahead of or comparable to the industrial project itself. The result is that the health-physics department has a very complete set of records of individual exposures, and on my last trip to Hanford and Oak Ridge I reviewed some 3,000 card records of people who were in the areas in which you might expect the greatest amount of exposure, and I didn't find one single case where anyone could be considered as having approached a quantity which was hazardous. In fact, many of you who have had a chest X-ray have had a greater quantity of radiation than some of the workers who have been in

the nuclear energy plants a number of years.

"With controlled radiation, the expected effect upon individuals and industry is neglible. The effect of radiation on persons in industry should be considered as being an occupational disease. There is no difference from the compensation standpoint or health standpoint between that and lead poisoning, chrome poisoning, silicosis, et cetera. It is a force which affects individuals if they are exposed to it. It is controllable, and if they get it in industry, then certainly it is an industrial or occupational disease."

While most writers indicate they believe the theory of strict liability will be followed by the courts,[23] Ralph Becker and Leo Albert Huard in their article, Tort Liability and the Atomic Energy Industry, 44 Geo. L. J. 59, 68 (1955), write, "classically, tort liability has been predicated on intentional conduct and negligent conduct. It is at once obvious that anyone causing intentional harm to persons or property through misuse of atomic energy facilities or radioactive materials will be held legally responsible for his actions. Similarly, liability for negligent conduct should present no problems of startling novelty. Courts will continue to speak in terms of duty, breach of duty, causation and damages. No change should be anticipated in the nature of the long-settled standards by which liability for negligence has heretofore been determined."

It seems hardly logical that the courts of the United States would strangle and impose the harsh and unyielding theory of strict liability upon this infant industry (soon to become a giant) which holds out so much in benefits to mankind and progress, in view of the safety record already established, together with the knowledge of safety measures which have been adopted and which have been effective to insure the workers and general public against injury.

Coming now to the nebulous doctrine of "res ipsa loquitur", as presently interpreted by our courts, the writer hopes, as in the case of liability without fault, that our courts will not impose this doctrine upon the atomic energy industry. It does not seem just to cast the burden of proving freedom from fault upon a defendant engaged in any phase of atomic energy activity, merely by having the plaintiff resort to the res ipsa loquitur doctrine, where there is doubt that the plaintiff's claimed injuries are due to radiation, and that the radiation emanated from defendant's control over the activity. This is particularly true when our courts have shown a disposition recently to depart from the "exclusive control" rule insofar as the defendant sued is concerned.[24] There appear to be too many imponderables presently in fixing liability upon a specific defendant for specific injury in the nuclear energy field to allow plaintiffs easy access to the res ipsa loquitur doctrine as against placing the burden upon the plaintiff to prove fault on the part of the specific defendant. Frankly, there are too many cases of "shot gun" justice in favor of plaintiffs on the books today, to permit this promising industry to be stifled and stunted by making it defend itself against plaintiffs who have no sound causes of action, but who hope to recover because the defendant cannot overcome the doctrine of res ipsa loquitur as presently determined by our courts. Is the doctrine to be extended, as it is in some of the "bottle" cases, to fix ultimate liability upon the licensee of a reactor for radiation injuries when these products have been sold and resold, or where the purchaser does not know how to use the product safely, or when the injury appears after there has been a lapse of several years between sale and injury? It does not seem unreasonable to require plaintiffs seeking to recover for claimed radiation injuries to prove the defendant negligent by a preponderance of the evidence and that such negligence was foreseeable by the defendant and is the proximate cause of the plaintiffs' injuries and damage.

Further, it is not believed the courts would find that the negligent operation of reactors or the negligent handling of any products of atomic energy activities would constitute negligence per se. The imposition of a negligence per se theory of liability for proximately causing injuries as a result of negligent operations or uses of atomic energy products would seem to impose too much of a burden upon the

[23] Prosser, Law of Torts 336 (1955).

[24] *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, 457; *Sweeney v. Erving*, 228 U.S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815.

defendants engaged in the industry in view of the safety records which have been established for the industry since 1943.

The doctrine of ordinary negligence should be made the test of liability in cases involving atomic energy activities in the opinion of the writer. There are many who claim this doctrine would put too great a burden upon the injured plaintiff, since it will be difficult for the plaintiff to prove negligence and causal relationship. Such an argument is not tenable today, it is believed, because the plaintiff in any such action will certainly be able to obtain just as much evidence to support his case as the defendant can produce to defend against the claim. By use of discovery rules, interrogatories, depositions and "plain hard work" the plaintiff, through able counsel, should be able to "make" a case without claiming the burden too great or unequal.

This positive stand concerning the applicability of ordinary negligence rules to atomic energy cases is adopted ever mindful of the dilemma of foreseeability posed in the *Palsgraf v. Long Island R.R. Co.* case, 248 N.Y. 339, 162 N.E. 99 (1928) and raised recently in Ohio in the case of *Lewis v. Woodland,* 101 Ohio App. 442, 140 N.E. (2d) 322 (1955).

Also it is urged that the doctrines of contributory negligence and assumption of risk be available to the defendant in defending against atomic energy injury claims.

The question of the applicability of a particular statute of limitations to these atomic energy cases poses a most difficult problem. What limitation as to time can be considered fair and just to both plaintiff and the defendant?

It is suggested here that the fairest statute of limitations would be one to be universally adopted by all states and patterned after statutes adopted by several of the states to serve the ends of justice in silicosis cases. For example, the statute limiting the bringing of actions for injuries developed in working in silicosis industries in Ohio reads as follows:

> "Sections 4123.01 to 4123.94, inclusive, of the Revised Code do not entitle an employee or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from silicosis, unless the employee has been subject to injurious exposure to silica dust (silicon dioxide) in his employment in this state preceding his disablement, for periods amounting in all to at least three years, some portion of which has been after October 12, 1945, except as provided in the last paragraph of section 4123.57 of the Revised Code.
>
> "Compensation and medical, hospital, and nursing expenses on account of silicosis are payable only in the event of temporary total disability, permanent total disability, or death, in accordance with sections 4123.56, 4123.58, and 4123.59, of the Revised Code, and only in the event of such disability or death resulting within eight years after the last injurious exposure. In the event of death following continuous total disability commencing within the eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.
>
> "Claims of an employee for compensation and medical, hospital, and nursing expenses on account of silicosis are forever barred unless application therefor is made to the commission within one year after total disability began or within such longer period as does not exceed six months after diagnosis of silicosis by a licensed physician. Claims of dependents for benefits on account of death from silicosis are forever barred unless application therefor is made to the commission within six months after death.
>
> "Sections 4123.01 to 4123.94, inclusive, of the Revised Code do not entitle an employee or his dependents to compensation, medical, hospital, and nursing expenses, or payment of funeral expenses for disability or death due to silicosis in the event of the failure or omission on the part of the employee truthfully to state, when seeking employment, the place, duration, and nature of previous employment in answer to an inquiry made by the employer.
>
> "The commission shall appoint three referees to be known as 'silicosis referees' who shall be licensed physicians in good standing who have by special duty or experience acquired special knowledge of pulmonary diseases and at least one of said physicians shall be a roentgenologist. Before awarding compensation for disability or death due to

silicosis, the commission shall refer the claim to the silicosis referees for examination and recommendation with regard to the diagnosis, the extent of disability, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and X-ray examinations, as the commission requires. The commission may designate a licensed physician, a pathologist, or such other specialists as are necessary to make an autopsy examination and tests to determine the cause of death and certify written findings to the silicosis referees. In the event that an employee refuses to submit to examinations, including clinical and X-ray examinations, after notice from the commission, or in the event that a claimant for compensation for death due to silicosis fails to produce necessary consents and permits, after notice from the commission, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of said silicosis referees and of such specialists and the expenses of examinations and tests shall be paid, if the claim is allowed, as part of the expenses of the claim, otherwise they shall be paid from the surplus fund."

If all the states could agree and adopt a uniform statute of limitations patterned along the lines of the Ohio silicosis statute, Ohio Rev. Code 4123-68, it is submitted that generally both plaintiff and defendant would be dealt with fairly. In following such a statute, the problems raised in the *La Porte* case, *supra,* would probably be met. This type of statute would help overcome the problems of latent slowly developing injuries, presently unknown results of exposure, laches in bringing action after discovery of the condition, together with providing for claims arising from death due to exposure.

It is admitted that even a uniform statute will not be the answer to the unknown variety of cases that will confront the courts in the coming years in this field of nuclear energy in that no time limit is ever satisfactory when it defeats a legitimate claim, but it is believed it is a step forward in seeking to do justice between the plaintiff and the defendant in trying to chart an equitable course into the many unknowns in the complex nuclear energy field of atomic liability.

The problem of "foreseeability" will become of utmost importance in deciding liability in atomic energy cases. It is believed that the reasoning of the court in the *La Porte* case, *supra,* and in the case of *MacPherson v. Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050 (1916), will be adhered to in that it is thought the courts hearing these liability cases on first impression will have to take into consideration the knowledge of the defendants concerning protection against injury from both a medical and scientific standpoint before fixing liability. Certainly, when the defendants exercise extreme care and protect their workers and the public against all known dangers, it cannot be said that such defendants would be held liable for injuries which result from unknown factors about which there is no medical or scientific information. It is believed that in such cases the defendants would be held to be without fault since the defendants could not possibly have "foreseen" the causing of such injuries.

Further, it is advocated here that a medical and scientific panel of eminent experts be established in each state to consider the problems of injuries alleged to be the result of atomic energy activities.

It would seem that each state through its legislature could adopt a statute which would make it mandatory for plaintiffs to submit to examinations by experts to determine the extent of injuries and the probability of the injuries being caused by or the results of atomic energy activities.

The foregoing panel of disinterested experts, both from the medical and scientific fields, is suggested because of the anticipated inability of average juries to comprehend or appreciate the technicalities of nuclear energy and the conflicts raised concerning injury and causation. Certainly, it cannot be justice if juries are to be called upon to decide complex medical and scientific questions, when presently, medical and scientific experts have difficulty in arriving at exact and complete answers to a number of the problems arising from the expanding uses of atomic energy and the development of new uses of isotopes in dustry and medicine. Why not permit juries to have the benefit of expert opinions, instead of al-

lowing them to be subjected to the psychological and physiological pushing and pulling indulged in by counsel for plaintiff and defendant in personal injury jury trials today? It is assumed that counsel for plaintiffs will be vehemently opposed to the medical and scientific panel theory of achieving a better and even-handed justice, but it is suggested that trials involving atomic energy injuries without benefit of such information being furnished juries can only result in verdicts arrived at by speculation, conjecture, passion or prejudice.

Also, speaking as one who has lost considerable confidence in the ability of any jury to render a verdict money-wise which is in keeping with the facts and injuries in a given case, it is suggested that perhaps the several states should adopt a uniform schedule of values for the varied injuries which are now known to result from radiation or negligent atomic enery activities, instead of permitting the jury to find the amount of any verdict which is to be returned against the defendant in these cases. This proposed schedule could be patterned after the many workmen's compensation laws now in existence which set a definite money value for specific kinds of injuries. (Parenthetically, the writer always has wondered, upon being apprised of some of the large verdicts returned against defendants in some cases, what those verdicts would have been under the same facts, if the juries in those cases would have had to consider the cases, understanding their own money would be used to satisfy the verdicts returned.) It is because many of the present day personal injury trials result in juries returning excessive verdicts that the suggestion of a fixed schedule of money damages be adopted in atomic energy cases is made. Otherwise, juries would be called upon to fix a monetary figure in each case, depending in a large measure upon their personal reactions to the facts, to counsel, the injuries and the magnitude of defendant engaged in an activity which, by its very nature, is mysterious and awe inspiring because of the almost unbelievable time and lifesaving products already being obtained from these activities. It is believed the sympathies and generosity (with the corporation's money) of the juries to the injured in these atomic energy cases would be too much for the corporation licensees to bear financially to justify the obligations of undertaking reactor operations, unless such a schedule as is suggested above could be adopted uniformly by the various states. Private enterprise and insurance carriers can be encouraged to enter wholeheartedly into this industry and the insurance phases thereof by the adoption of the suggestions made above, to-wit: a sensible, uniform statute of limitations, ordinary negligence liability, access to contributory negligence and assumption of risk defenses, medical and scientific panels, together with a fixed monetary schedule for injuries.

MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N. E. 1050 (1916), clearly will be the foundation from which liability will be spelled out against the manufacturer or architect of an atomic reactor. Here again, the probable foreseeability of the dangers will be of paramount importance, just as it was in the *MacPherson* case, *supra.*

In this connection, it is believed that manufacturers, distributors, and retailers of the various materials, parts, and machinery going to make up a reactor would be equally liable along with the manufacturer or designer[25] of the completed reactor. See Restatement of Torts, secs. 265 and 266.

Interwoven with the liability for negligence for personal injuries and property damage are the questions of liability for expenses and implied warranties. With the expanding views of the courts and their refusal to strictly enforce the privity of contract rule, it is believed the manufacturer of a reactor, the designer or architect of the reactor, and the manufacturers, distributors and retailers of all the parts of a reactor will be held liable for breaches of express and implied warranties.

In addition to all of the foregoing, questions and problems involving primary and secondary liability, indemnification and subrogation will certainly be raised, together with questions concerning the possibilities of limitation of liability by contract, or by the creation of separate corporations to share the losses, if any, of operation.

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[25] *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F. 2d 908, cert. denied, 334 U.S. 846.

Conclusion

The comments and observations made above clearly point up the need for legislators, courts, lawyers, physicians and scientists to work closely and painstakingly together to achieve the best obtainable results possible in the atomic energy field for the benefit of all mankind. Careful appraisals of all novel theories and departures from legal precedents urged in this field should be made before adoption thereof, so that at all times the public good is served and justice is done.

In conclusion, it is stated by the writer that this paper is probably best described as a summary of some of the ideas and suggestions appearing heretofore in various law review articles, addresses, pamphlets and books on the subject of Atomic Energy. Many of the statements and arguments appearing in this paper have been set forth in previous writings; and credit therefore is duly given by citing, as reference and source materials, the names of the authors and their writings in the bibliography and footnotes made part of this paper.

Suffice it to say, no liability subject can be of more timely interest, nor present as many fascinating problems involving so many fields of the law as the atomic energy industry—the infant soon to become giant!

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Insurance Supervision and Current Trends*

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THE great weakness of state insurance supervision as it now exists is the lack of uniformity between the laws and regulations of the various states in those areas which cut directly across a company's ability to do business on an interstate basis. For example, a company or bureau wishing to use a new form on a country-wide basis is confronted with 52 separate jurisdictional approvals and an equal number of different filing regulations. I am not interested in uniformity of operations between companies, or of policy forms, either, for that matter, but I am interested in uniformity of ground rules pursuant to which a company must conduct its business.

My daughter came home from school the other day with this cheery little poem:

> Their meeting was so sudden,
> Their meeting was so sad,
> She gave her life so meekly,
> 'Twas the only life she had.
> And down beneath the willow
> She lies so peacef'ly now;
> That's what always happens
> When a fast train meets a cow.

I recite it to you because it describes a situation which parallels what some infer will be the result of the head-on collision between the Anti-Trust and Monopoly Sub-Committee of the United States Senate and State Insurance Regulation. There are those who would compare the Senate investigation to the fast train, and State Regulation to the cow. I do not. I prefer another of my daughter's school-acquired doggerels as more descriptive of the situation:

> I eat my peas with honey.
> I've done it all my life.
> It makes the peas taste funny,
> But it keeps them on the knife.

State regulation has occasionally tasted funny, but, by and large, it has adhered to the knife and nourished the purpose for which it was intended. I predict that it will continue to do so in spite of the Senate investigation for many more years —provided it overcomes some of its present weaknesses—the most obvious one being its lack of uniform application.

The National Association of Insurance Commissioners is struggling for more basic uniformity among the states insofar as laws are concerned, but progress is difficult and tedious. If uniformity in method of administration can be achieved we need have no fear of federal intervention.

A further weakness we must overcome if state regulation is to persevere is the problem of adequately staffing the various state regulatory departments. This is largely a problem of adequate legislative appropriation. With one or two exceptions, state legislatures have over the years provided their state insurance departments with too few dollars to make possible really effective and thoughtful regulation. Most of the departments, and Ohio is no exception, are so thoroughly ensconced in meeting the day by day deadlines and processing the hourly work load that little or no time can be given to imaginative or progressive original thinking. Our research facilities are virtually non-existent. We must rely heavily upon the facilities industry can place at our disposal or the investigations and thoughtful analyses more perfectly constituted state departments will make available to us. I must admit, however, ever since I read that recently published book entitled Parkinson's Law, I have viewed the constant attempts of state regulatory officials to enhance their budgets and their prerogatives with considerable misgiving. Nonetheless, I am persuaded that the basic shortcomings of state regulation are attributable primarily to inade-

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quate staffing which is the direct result of inadequate financing.

Looking the present regulatory situation in the face, we find that state regulation is under attack, is being investigated, has become defensive. It is time to take the offensive. This can be done by counterattack or by emphasizing the positive. Counterattack is neither dignified nor properly effective. For instance, the inquiries last year by the Sub-Committee on Legislative Oversight have demonstrated that simply because a regulatory agency is given the blessing of federal authority it is not above suspicion nor it is necessarily more capable of being superregulatory than any other duly constituted regulatory authority. As a matter of fact, some of the disclosures made at that time would lead reasonable men to conclude that exactly the opposite is the case. Be that as it may, we have no intention of attacking. We must, instead, present the positive virtues of state regulation. What are these? Here are some of the most apparent ones:

1. Problems peculiar to each state and locality can be better solved on the spot by one familiar with the local people and practices than they can by remote control from Washington.
2. If the commissioner of any particular state makes an error which adversely affects the industry, the effect of the error is confined generally to that state. On the other hand, should an administrator in Washington commit a similar error, the result could very well be a nationwide disaster for the whole industry.
3. Insurance is about the only commerce both interstate and intrastate in nature which is not subjected to two, or perhaps even three, separate regulatory authorities. Public carriers, for example, are controlled not only by the ICC, but also by state public utility commissions. Some are even controlled within the confines of certain municipalities by municipal commissions. Jurisdictional problems as to which authority controls a given set of facts are a constant and expensive burden. In the regulation of insurance, so far, these problems have been avoided under exclusive state supervision.
4. State regulation has made innovation and newness possible in the business. A new idea can always find some method of expression in at least one of the 48 states. There is almost always a commissioner who can be found to approve a policy change or some other new form in his state. If the experience produced in that state is good and public acceptance is favorable, if the experiment works, the idea will spread and the public will benefit. On the other hand, singular administration from Washington could very well make experimentation impossible and lead to stagnation and retrogression.

These are only some of the advantages of retaining regulation in the hands of the states. Others have undoubtedly occurred to you. They should be forcefully asserted, positively espoused. I am confident that these and similar advantages far outweigh all the arguments that have and will be made favoring federal control of insurance. I am further confident that state regulation will be strengthened by the impending Senate investigation and that its virility and effectiveness will be given rebirth thereby. The investigation may very well be a blessing in disguise.

Looking further at the present situation we find that this business is in a turmoil of internecine attack. Not only have we our problems with the Congress, we also have our problems with each other. The age-old nonsensical battle between the stocks and mutuals has flared up with renewed vigor in the past few years. Agents and companies, mutually interdependent as they are, have been scrapping unremittingly, refusing to exchange information or views. Even some commissioners have been caught up in personal misunderstandings with other commissioners. All of this is not only consuming a great deal of thought and energy which might be better put to work in elevating the industry and competing for business, but it is destructive of the public confidence which the industry has spent years building. In this day and age of pressure and unusual difficulty we would demonstrate much higher intelligence and good sense if we stopped our internal bickering, which has accomplished nothing but a forum for further bickering, and devote our efforts to improving our product and selling it. It is growing more and more apparent that our intra-

industry attacks are creating a climate of opinion in the public mind which subjects us to attack from that quarter also. The various legislatures have already become most chary of insurance. We hear the complaint more often these days than ever before that the best way to kill a piece of legislation is to demonstrate that insurance interests are behind it. This is a bad situation which can only be corrected by the whole industry burying its collective hatchet and working together to achieve some semblance of harmony.

Our industry, like most others, has had a colorful history. Difficulties are not new to us; neither are successes. The present era has its counterparts in times gone by. I don't believe I ever read a speech no matter whether given last year, ten years ago, or fifty years ago, that did not decry the then current situation and view it with the most extreme alarm. It is human nature for men to view their present difficulties as uniquely unfortunate. We should not lose heart. Ten years from now our present problems will appear to us as child's play.

Let's take a quick look at the history of the regulation of this business. We give the Bablyonians credit for thinking up the idea of insurance itself, some 4000 years ago. After that, regulation took hold in the 13th century when the Pope prohibited bottomry loans which avoided the application of the usury laws. The first legislation having to do with insurance was enacted in the Italian city state of Genoa in the last quarter of the 14th century. The first insurance commissioner was appointed in Florence pursuant to the Statute of 1523. You can see that insurance commissioners are not a new or novel idea. The first commissioner in the United States was appointed in Massachusetts in 1827.

The early laws dealt primarily with taxation of insurance companies and prescriptions for the maintenance of solvency. As the business grew, however, these laws were expanded to take charge of almost every facet of insurance enterprise. Today, as you know, this business is one of our most completely regulated.

The early history of insurance is a history of indemnity for loss rather than protection against hazard. The earliest forms were marine forms. It made little difference to the insured how the loss was incurred, whether the ship sank, was stranded, or captured. All he wanted was indemnity for his loss. Consequently, all early coverage was multiple line. This early practice has carried on in England to the present day. In this country the early concept of insurance was multiple line too. The Insurance Company of North America was originally organized for the issuance of fire, marine, and life insurance. The Aetna Insurance Company had similar broad powers. When the Travelers was organized it was given life and casualty powers. The right to such powers seems to have been accepted without question.

In 1870, however, the trend for separatism began. The New York commissioner got the Legislature to prohibit life insurance companies from engaging in fire, casualty or related lines. Later, other states, at the behest of the newly organized National Convention of Insurance Commissioners, followed suit. Still later, legislation grew up preventing fire companies from writing other lines, casualty companies from doing likewise, and life companies from engaging in any business other than the life business. The reason such separation of powers, known as the American System as distinguished from the English system, is not recorded clearly. Such separation probably was due to the various methods of holding life reserves in trust for policyholders; the thought being that it was better to divide the assets between two corporations than to hold them as ear-marked reserves in but one company. The separation of fire and casualty powers probably stems from the fact that there were numerous small and shakey companies in the business at that time which folded under the catastrophic losses sustained when whole cities burned. Anyway, for one reason or another early insurance management got the idea that assets should be held for one purpose only. It should not be forgotten that casualty coverages were new, untried and suspect by many at the time.

The Appleton Rule in New York capped the American System of emphasis on separatism by requiring any company doing business in New York to engage in one line of the business only.

As time went on, however, the need for broader coverages in one policy became apparent and in 1943 the NAIC ap-

pointed an industry committee to investigate the propriety and difficulties which might be encountered in affording multiple line powers to other than life companies. The report of this committee, supporting multiple line underwriting powers, has been credited with starting the state by state legislation which finally today permits multiple line underwriting, by fire and casualty companies, throughout America. That package contracts have met with public acceptance has been thoroughly demonstrated. But where does multiple line go from here?

There is little doubt that before many more years elapse, the so-called American System will be completely replaced by the so-called English System. We shall progress into the past, so to speak. I think we can count on the companies which have traditionally written fire and casualty entering the life field and those which have traditionally written life entering the fire and casualty fields. The trend has already started. Fleets of companies are already writing in both areas. The idea is gaining acceptance and popularity. Life agents are taking on general lines companies; agents in the general lines are taking on life companies. Before long multiple-multiple line amendments to the various state laws will abolish the traditional American System forever. These amendments will not come easily, however. Recent history has demonstrated that. The multiple line laws we have on our books right now did not come without a great deal of blood, sweat, and tears and the concomitant wailing and gnashing of teeth such things entail. If our present multiple line laws came with difficulty, however, imagine the hue and cry incident to getting life companies into the fire and casualty lines, or fire and casualty into life. In addition to the adjustments in managerial philosophy such changes will necessitate, visualize, if you can, the difficulties which setting up and preserving the reserves of the various coverages will present. Such difficulties will probably result in the first policy which combines general coverage with life affording only term life insurance. It will be many years before all the changes or inventions which will be necessary to allow legal reserve life to be sold along with fire and casualty can be made or imagined.

We should not lose sight of the fact that life and casualty coverages have been crossed today and are sold in combined package form. For example, accident and health, normally considered a casualty coverage when written on a non-renewable basis, has been combined with life. Life companies have entered the accident and health field very successfully. The group life field is akin to general lines even to the unrelenting competition which is being waged for business therein. If these kinds of coverages can be cross-written right now, if medical pay can be attached to automobile liability, if group accident and health can be written by multiple line companies, there is nothing to prevent either practically or philosophically the broadening of multiple line powers to include the writing of life insurance on a non-legal reserve basis.

Consequently, the future will formalize into law the situation which almost exists today. But it will be a lone time before legal reserve life is written by general line companies.

The broadening of underwriting powers will present more problems than the mere concept suggests, but that does not mean we should deplore the situation. And one thing is sure, this industry is not going to solve those problems in advance. It didn't with our present multiple line laws and there is no reason to think it will change decidedly in the future. But difficulties have always sooner or later been overcome.

The future is also going to bring a resolution of the current difficulties state regulations is encountering. As I have intimated already, I do not believe that federal regulation is in the cards. I may live to eat these words, but in addition to the fact that federal regulation doesn't make very much sense, I don't know of anyone who espouses it. Not even the Senate Committee is talking about doing away with state regulation. It is simply talking about learning whether state regulation has done all that was expected of it and all that it promised it would do when the McCarren Act was passed. As I have said, this Senate investigation may be a blessing in disguise. It may point up the weaknesses of the present system and permit us to correct them — to everyone's benefit. It will undoubtedly give us ammunition to use before our legisla-

tures. Remember, the TNEC investigation of the thirties, with its scathing report, preceded the McCarren Act. Those findings did not justify, apparently, the Congress setting up a federal bureaucracy to administer unto insurance even when the question was clearly before it following the SEUA decision.

But state regulation is going to have to change. If it doesn't get better, if the commissioners are not able to approach a company's problems with a common set of ground rules; if the undue lack of uniformity in regulation is permitted to persist, it won't be the federal government that we find calling for federal regulation, it will be the insurance companies themselves. We commissioners have a grave responsibility to see that uniform laws are promulgated. If we fail in our responsibility by clinging to the somewhat dubious prerogative of viewing our own state as an island sacrosanct and sacred unto its own individual sovereignty, the industry will eventually grow tired of the multiplicity of rules and regulations it must encounter in doing a countrywide business and fall upon us in righteous indignation. As I have pointed out on other occasions, there is an argument to be made for the proposition that 52 separate jurisdictional requirements in and of themselves create an undue interference with interstate commerce. Unless the commissioners are assiduous in their endeavors to secure uniformity in laws and regulations, federal legislation may become the lesser of two evils the industry has to face. But even then, it is my prediction that such laws may very well be administered by the various states in much the same manner as unemployment compensation laws are administered.

The future is going to bring change in the traditional concept of insurance agencies. In addition to the greater number of tools an agent will have to work with — equipped with both life and general coverages, a trend which is already well underway—agents may well be divided into two distinct legally constituted groups. One group will constitute the pure salesman who will be on commission and similar to most other salesmen. These agents will simply distribute insurance policies. Their commission will be geared to the mere service of distribution. They probably will not render any other services either to assured or company. They won't be able to afford to. The other group will be counsellors or advisors. They may not even represent companies. They may be brokers in the truest sense of the word, representing the assured, and offering him such services as are currently ascribed to the American agency system agent. I make no comment as to whether this will be either a good or bad development. I see it coming, however, and I suspect in time all of us will get used to it. In Ohio it will require changes in the laws. But such a necessity will not, in my opinion, alter the inexorable course the industry seems to be pursuing at the present time.

Rates and rating will receive much attention in the future. I think the time is coming when rate-making is going to be purely a company or bureau function. Laws will be changed. Safeguards will be needed. But more and more of those in the industry are beginning to recognize the impossible task state departments are saddled with in carrying out their duties of rate approval. I don't pretend to see clearly the answers to present rating problems, but I predict that changes involving answers are in the offing. I think the whole industry should study the present situation and compare rate regulation in our business with what has happened to the railroads and airlines in the common carrier industry. The similarity is found in the fact that where there is no monopoly, where competition has existed in modes of conveyance, rate regulation has apparently delayed needed increases to such an extent that reasonable men have asserted that the industry is being impoverished.

Again, let me make it clear that I don't have any panaceas, but I am not unmindful of some of the difficulties the insurance industry has faced in the past few years with respect to applications for rate increases.

As the future bears down upon us, we see ever more clearly that regulation of this business must keep abreast of the times. There are changes ahead which will require the best of every commissioner. Old concepts will be replaced by new ones. Unthinking opposition to newness has never been in the public interest and will not be so in the future. New stan-

dards of performance on the company and agency level are already upon us. Agency qualification laws are being amended. Regulation is becoming more complex. Investment laws are changing. Policy forms are being altered. Rating formulae are growing exceedingly involved. We stumble and fall on occasions, but the bruises received keep reminding us to beware of the same difficulties again. In all, as the future comes upon us, we regulators and the industry remember that our duty is to the public. This duty crosses two broad areas—company solvency and the preservation of a free and competitive market. Shepherding both of these in the years ahead is going to be extremely difficult and highly technical. Consequently, our forward movement is going to have to be slow and careful—but we will proceed learning as we go. Extreme patience will be required of everyone concerned—much more patience than has been demonstrated recently. Negotiation and prior disclosure of all undertakings will become more necessary than ever; the past few years have already demonstrated the desirability of such procedures.

For the adventuresome spirit the future of this industry is extremely enticing. But the future depends upon the competency of regulation. It can shepherd or it can stultify. I am persuaded that it will shepherd.

Casualty Rates and Rating*

GEORGE H. KLINE**
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THE opportunity to lecture to officials of insurance departments is a rare treat for me. Frankly, I am taking great pleasure in it. My feeling is a natural one, I suspect, since in recent years I've spent most of my time being lectured at by members of insurance departments. So now the worm has turned! The shoe is on the other foot, and I'll make the most of my captive audience.

I presume that anyone who sets out to address rate regulators on the explosive subject of casualty rate approvals should do so with a great deal of trepidation. Strangely enough, I feel quite as ease.

One reason is that I am literally surrounded by old friends and former coworkers and therefore feel very much at home. Joe Murphy, who preceded me on this platform, was my successor as Rating Deputy in the New York Department; Roy McCullough, who follows on the program, was my predecessor as the Rating Deputy in the New York Department; of Mr. Dineen I will have more to say later.

Moreover, I have had the pleasure of working with most of you over the years; and from this contact I know that in addition to being here among friends, I am privileged to meet with an audience of highly competent technicians. For that reason, my remarks on "Casualty Rates and Rating" will not be of a technical nature, for there is little that I can add to your store of such knowledge. Permit me, instead, to sketch some observations on what I believe to be the true objective of casualty rating by the states, and the philosophy which you should apply to filings in an effort to achieve such objectives.

Mr. Dineen, our chairman today, was my inspiring and helpful chief for a number of years. Incidentally, he was also among the distinguished personalities who participated in the first institute in 1951. At that time he commented on the philosophy of a state insurance department, and advanced thirteen fundamentals of conduct. May I recall one of them to you. It was, "Don't Use All The Tools in Every Case Simply Because They Are in the Box."

In explanation of this fundamental, he said:

> "A rate regulatory law may be compared to the repair shop of a garage. A well-equipped shop has all the tools necessary to do a variety of jobs from reboring a cylinder block and replacing a rear and to a minor job like grinding valves. If a car is brought into a garage because the pinion gear in the differential is stripped, no one would seriously urge that the proprietor was obligated to rebore the engine at the same time simply because he had the tools to do it with.
>
> "So it is with a rating law. Within the framework of All-Industry bills, rating law tools were provided to deal with rates made in concert by the price fixing combinations which we know as bureaus and those fixed by independent companies. The rating laws were designed to be flexible . . .
>
> "Insurance Departments like businesses, must determine where the services of their personnel are most needed and where they can be best used to advantage. Using every tool that the law provides, in every case, on a routine basis will not achieve this result."

Having worked under Mr. Dineen, I greatly respect his judgment, and agree with these sentiments. Continuing, his analysis, it might also be said that different tools are required for different situations. A department which uses the same tool, or even the same kind of tool, in every case limits its effectiveness, and may even do great harm.

Putting aside the question of methods for a moment, and returning to the matter of philosophy and objectives, it is fair to ask, "What is there to say about the objective of state regulation which is not already spelled out by the law itself?"

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*Delivered before the Insurance Regulation Institute, Michigan State University, February 11, 1958.

**Vice President and General Counsel, Allstate Insurance Company.

Your rating laws all recite:

> "The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate, or unfairly discriminatory . . ."

This is all well and good, but the objective which I have in mind begins where the language of the law ends.

Sometimes we become so involved in the details of the work which we do from day to day that we tend to lose our sense of direction. When this happens, our decisions become of necessity a patchwork quilt of expediency, happenstance, pious expectation, and blind guesswork. Since we are gathered together, by and large, to re-orient ourselves, let me start by stating the purpose of casualty rate regulation, as I see it.

We all know that in its modern aspects at least it stemmed from the S.E.U.A. case and Public Law 15. Underlying that, however, what was its purpose? Was it to protect the public from insurance companies, companies from the public, companies from each other, companies from agents, agents from companies, public from agents, agents from the public, or companies from their management?

I raise these basic questions because it is so easy for the rate regulator, immersed in the complexities of his job, to get headed down the wrong road, or to assume that there is only one road. In either case, the regulator is detoured away from the basic and primary purpose for his existence.

You will agree, I am certain, that the primary purpose of casualty rate regulation is to protect the public. Other results, however desirable, are merely incidental. Insurance departments and their insurance statutes, including casualty rate regulatory laws, exist basically to guard the interests of policy holders. Any protection afforded to companies or agents by law, or by action of an insurance department, must first serve the ultimate goal, directly or indirectly, of policyholder protection. Thus, if the emphasis is misplaced, the validity of the action is questionable.

The common provision of the all-industry law which we all know by heart is that rates shall not be excessive, inadequate, or unfairly discriminatory. How do we square the basic principle enunciated above with these standards?

For the sake of brevity, let me omit from this discussion the problem of unfair discrimination and address myself to the question of the excessive and the inadequate casualty rates. These are the major determinations which insurance departments are most often called upon to make in connection with casualty rate filings.

I must say that conditions being what they are today in most states, excessiveness of casualty rate levels is more of an imaginary problem than a real one. Unreasonable profit is not a major factor under the systems of regulation existing in most areas, because a built-in safeguard militates against it. The safeguard is stronger than any specific rating laws or procedures which could be established by the legislature or by an insurance department. This safeguard, this built-in ceiling which so ever-watchfully destroys the danger of excessiveness, is (and I'm sure you're way ahead of me with the answer) competition.

Rates which are excessive cannot long endure in the competitive climate of our business. Certainly, you should examine every proposed rate level and satisfy yourself that the public would not be charged more than is proper. This is always necessary and some remarks upon how it should be done will come later. At this juncture, I merely suggest that many of the casualty rate filings which pass across your desk have already been tempered by competition, and in this process the public has fully and adequately been protected against excessiveness of rates.

This is so because in our competitive market no management can afford to price itself out of business. Any company or group of companies which seek to grab inordinate profits in such a market are destined to find both their share of the market and their profits swept away by the tidal wave of competition.

And although use of the word "competition" may ordinarily bring to mind independent companies and deviators which compete to a great extent through lower rates, bureau companies which make rates in concert are also engaged in rate competition. They are faced with the practical necessity of keeping their rate levels reasonably competitive with the independents and the deviators.

Bureau companies also compete in other and very effective ways. For example, take

a look at their present classification plan which provides for six classes for auto liability insurance (not including farmer classes). The bureau classes have been undergoing constant refinement over the years and eventually evolved into the present six classes. In speaking of the competitive aspects of the class plan of the National Bureau of Casualty Underwriters, Mr. Cahill, its secretary, recently said:

> " . . . we can be thankful for use of a refined classification plan for private passenger cars which helps to keep down the rates for the preferred classes of risks comprising over 75% of the total. *If it were not for this plan, it is probable that by now the specialty companies would have managed to garner an even larger proportion of this business than they have . . .*" (Emphasis supplied.)

Bureaus also compete by means of new policies such as the "Family Automobile Policy" which has been a successful competitive tool. An even newer version of this policy has already been approved for the National Bureau. Finally, consider the varied and different advertising techniques which each company uses to distinguish itself from every other carrier in the business.

Thus we see that the competitive battle for the consumer's dollar is being fought on many fronts. It takes no prophet with a golden key to the future to predict that the outcome of all this activity is highly desirable. It will create more protection and a better product for the insurance buyer.

I have sketched for you some of the reasons why I believe that the competition existing in most states makes it highly unlikely that any proposed rate level will be excessive. I am not alone in my belief as to the value of competition to the rate regulator. For example, let me quote the Honorable Paul Hammel, Insurance Commissioner of Nevada and Secretary of the N.A.I.C.:

> "I am going to be quite candid and say to you as an Insurance Commissioner that if I had the wisdom of Solomon, the integrity of Lincoln and fifty times my present budget and staff, I could not do as good a job regulating insurance in the public interest as true, honest and open competition can. May the day never come when we in America will ever deny others the liberty to do business because they do it in a different way. Liberty and freedom are things you can *not* have unless you are willing to give them to others."

Our host, Commissioner Joseph Navarre, has frequently expressed similar sentiments with similar eloquence.

We all know that the Congress in enacting Public Law 15 intended to preserve competition within the framework of state regulation. The S.E.U.A. decision itself was rendered because competition had been suppressed and monopoly was rampant. It is significant that Public Law 15 reserves to federal control acts of boycott, coercion and intimidation, indicating that although the Congress desired state regulation, boycott, coercion and intimidation, all acts designed to destroy competition, were retained as federal violations. It is an understatement to merely say that fostering and encouraging reasonable and proper competition is a function of state regulation. The blunt fact is that such competition is essential to the continuation of state regulation itself. Proper competition is the most valuable assistant in the casualty rate section of an insurance department — this assistant requires no pay, takes no holidays, and is never on sick leave.

Before passing on to the question of adequacy of rates, let's talk for a few minutes about statistics and judgment. Statistics are important and they have a necessary role in the various casualty rate statutes. But they should be used by companies and by departments as a supplement to common sense, not as a substitute for it. They are important only as a history of the past and some indication of what *may* happen in the future.

Unfortunately people driving cars don't read our statistics — nor do juries, or auto manufacturers, or repair shops, or doctors, or hospitals. The fact that it rained on April 15 for five straight years does not necessarily mean it will rain on April 15 in the sixth year. Statistics are one of the useful tools of our industry, but they are not the whole tool chest!

Statistics often supply necessary standards against which to measure the judgment exercised by the bureau or insurer filing proposed rates. The informed judgment of competent management in rate matters involving basically the funds of a

solvent and sound insurer is entitled to great weight, particularly so if such judgment is reasonably supported by the submission of what information is available and the basis for such judgment is adequately explained. Is the judgment of a rate supervisory official any better? I submit that in most instances it is not.

An insurer or bureau should be permitted to experiment and progress, based upon its sound and properly exercised and supported judgment. Certainly in the case of an individual insurer, if it is solvent and the proposed experiment does not threaten its solvency, there exists no public interest requiring the disapproval of such filing, even though supported entirely by judgment. The company has the ability to remain solvent and pay its claims and after credible experience becomes available, the filing can be re-examined in the light of such experience. If the filing later proves unsound, no harm has been done to the public.

The National Bureau in establishing its new class plan for automobile liability insurance, could not furnish complete statistics to support such plan. Instead it properly substituted informed judgment for this lack of experience, and insurance departments throughout the country properly accepted this judgment and approved the filing. (Perhaps in this particular case, all concerned felt a little easier in their minds because my company had for many years been successfully using a very similar class plan.)

Rates could not be developed for any new coverage unless judgment were accepted, since no experience or statistics exist for new types of protection. Could the National Bureau Family Automobile Policy have been introduced, and rates approved, unless judgment supported not entirely, but only in part, by available statistics was an acceptable criterion?

I want to say also in regard to statistics, that every intelligent method may be used to update past experience (as represented by statistics) to the present and on into the future. Properly applied trend factors merit your approval.

No rate regulatory official needs statistics to tell him that recent years have seen a vicious inflationary spiral compounded of expensive automobiles, high jury verdicts, increased labor costs, skyrocketing medical and hospital costs — common sense and personal experience tell him this is true.

Who can say with sincerity that proper trend factors have no place in today's casuality rate-making? If this business, and the officials supervising it, were to persist in the endeavor to live in the past, a substantial portion of the business would die of rate malnutrition. Insistence upon full development of antique policy years as a basis for rate-making in the light of today's fast-changing events is completely unrealistic. I shall not use statistics to predict the life expectancy of our industry — but I do predict that the failure to make proper use of trend factors will cut the expectancy short!

I have taken a long time to say what might have been said very simply — that although figures may be honest, they accurately reflect only the past from whence they came, and not necessarily the future toward which we must go. As to the future, they may at best be a shadowy omen. When they do not foretell the future, judgment must be used. Judgment, therefore, necessarily has a place in the rate-maker's kit of tools. Willingness to accept such judgment necessarily therefore should be inherent in the approach of the rate regulator.

The laws of each of your states say, "The information furnished in support of a filing may include (1) the experience or judgment of the insurer or rating organization making the filing . . ." In passing, let me emphasize that the statute does not limit judgment to the collective judgment of a rating organization, but also makes equally important that of an insurer. To me, this means that when an independent insurer has solved a problem by the exercise of judgment in one direction, you should not require the bureau to follow suit. The converse, may I emphasize, is also true—do not force bureau judgments on non-bureau companies. So much for that.

Now, the question of adequacy. In establishing the adequacy of bureau rate levels for companies making casualty rates in concert, I submit that the rating bureau and the rate supervisory official have the following responsibility. They must ascertain that a proposed rate, whether based upon experience, or experience and judg-

ment, may reasonably be expected to produce enough income so, on the whole, the bureau members will not lose money. As to deviators and independent companies, filing rates at some figure less than the bureau rate level, it must be determined that expense savings or loss savings or combined expense and loss savings equal to the amount of rate differential have been demonstrated. This may be done by experience, or experience and judgment, and should reasonably assure that the solvency of the filer is not threatened.

Earlier in these remarks I discussed excessiveness as it relates to competition. Now let us consider the profit factor as a tool for determining *if* a rate is excessive . . . emphasis here is on the word "if." *How* the profit factor should be arrived at, or what figure should be used, are another matter.

Let us for convenience start with a bureau example. Assume a 5% profit factor was built into a rate filing which you approved and that when the year was over, the other loss and expense factors turned out by odd coincidence to have been exactly accurate. In other words, the final developed figure showed that exactly 5% had been made. Assume further that there were 100 companies in the bureau. Would each of them have made a 5% profit?

Obviously not. The 5% figure represents the average result of the collective rate level and not the profit figure for each individual company. As a matter of fact, if we assume, as would be normal, that the 100 companies have a differing expense ratio, and that losses also varied, it would then follow that approximately half the companies made more than 5% and the balance less than that figure. To round out our hypothetical case, assume further that the highest profit made by any one company was 30% and the greatest loss of any one company was 30%. In other words, there was a 60 point variation between the highest and the lowest company.

Absent any threat to solvency, could you as regulatory officials force an increase in rates of the company which lost 30% on the ground that its rates were inadequate? I think not. How about the other company. Would you have any power to force it to reduce its prices on the ground that its profits were excessive? Again I think not. In both cases, the all-industry type rating law requires that every member or subscriber to a rating organization adhere to the filings made on its behalf by the rating organization.

The only exception is where an individual insurer makes written application for deviation which may be approved or disapproved. If the filing made by the rating organization is proper for the members and subscribers as a group, no authority exists, absent written application for deviation, to prescribe different rates for any individual insurer; in fact, the law requiring adherence would prohibit this! In the case of a deviation, it may only be approved or disapproved and if deemed adequate, no power exists to require an insurer to increase its downward deviation.

From this it follows that the profit factor you built into the filing dealt with over-all rate levels of companies acting in concert and not the experience of an individual company.

Suppose, however, the successful company in the light of its 30% profit seeks to deviate by 10% from the rates of its bureau fellow members. Now what would you do? Would you try to force the applicant company to deviate 25% so as to reduce its profit to 5%? Again I think not. I doubt that there would be legal justification for any such attempt. Furthermore, by the simple act of withdrawing its deviation application, the deviating company could return to making a 30% profit rather than the 20% profit which it sought or the 5% figure you attempted to impose upon it.

The same point can be illustrated another way. Assume that in our hypothetical example set forth above, the aggregate of company experience indicated beyond any doubt that an increase of 10% in rate level was necessary. Let's assume further that you intended to grant the application. But prior to approval, your attention is called to the fact that this would mean a profit of 40% for one company while the other would still operate at a 15% loss. Have you the power to force an upward deviation in the one case, or a deviation downward in the other as a condition precedent to granting your approval? Obviously you do not!

On the basis of the foregoing, it is clear to me that both law and logic lead to this conclusion . . . that profit regulation was designed to control rate levels of compan-

ies acting in concert and not individual profits on a company by company basis.

How does this principle affect non-bureau companies? Let us now assume that an individual filer submitted a casualty filing to you for approval. Here again, as with your consideration of a bureau filing, you should have in mind our basic first principle that the function of the rate approval chore is to protect the public — not the companies from each other, or to shelter any other special group. Assume further, if you will, that the statistical evidence is clear and that the filer in an effort to clear away any mystery tells you in his filing letter that if approved, his resulting rate level will be 15% less than that rate which you have heretofore approved for the bureau companies.

Let's tie it up even further. You are wedded to a 5% profit philosophy and it is clear that the filer's loss and expense factors are such as to produce for it a 10% profit. Are the proposed rates excessive? If you as rate regulator say to this filer, "This is an excessive profit. You will have to charge even less," the insurer will have no incentive to operate efficiently, to save money and pass such savings on to its policyholders in the form of lower rates.

In other words, and particularly if the deviation is based on expenses, it will have no incentive to compete since you have removed the profit motive from its operations. What then would be the result? Faced with the fact that efficiency can no longer be rewarded by profits, it seems to me the inevitable next step is the elimination of efficiency. Here you see the tools of regulation improperly used, with harmful results.

The position of our rate regulator in the situation just described becomes somewhat ridiculous when we realize that the independent filer confronted by such a situation would not have to accept your edict. In addition to litigating the matter, which I feel confident it would do successfully, there are other and effective courses it could pursue. It could join the bureau and charge the full bureau rate. If it did so, you would have no power to force it to deviate and it would be able to realize a 25% profit rather than the 10% profit inherent in its original filing.

Your answer to this might be, "it would not do that. Its business is built upon a lower price." Assuming for the moment that such is the case, what is the company's next move? It seeks to deviate. Its application asks for a 15% deviation. Again you are confronted by the fact that the company will have a 10% profit. We have already concluded you cannot force it to widen its deviation. What then is the result? The insurer ends up at exactly the rate level proposed by its independent filing and all you have accomplished is to force an independent company into the bureau. But the law frowns on this accomplishment. The statute specifically recites that "uniformity among companies . . . is neither required nor prohibited." The language and the purpose of the statute, it seems to me, are crystal clear. A company cannot be prohibited from joining a bureau . . . and, by the same token, no company can lawfully be required to join a bureau!

Let me sum up this point as a matter of principle. The rate regulator must realize that when a member or subscriber to a bureau files for a downward deviation, the deviation may be either accepted or rejected, but no authority exists in him to require a greater deviation than that requested. Because this is so, no question can be raised with regard to whether the deviator will realize excessive profits from the filing; the downward deviation, being a lesser rate than the full bureau rate, cannot be excessive nor produce an excessive profit. The same rule of necessity must apply to independent filings.

Profit factors then were created only for use in considering filings of bureaus based upon combined experience. They are an arbitrary device conceived only to be used in arriving at rate *levels* for groups of companies making rates in concert. They may not properly be applied to the experience of any individual company, whether it be a bureau member, or subscriber charging full bureau rates, a deviator, or an independent filer. Since the profit factor is not applied to an individual bureau company, subscriber or deviator, any attempt to use this test only for an independent would be to deny the independent filer equal protection under the laws.

Excluding a few extraordinary situations such as specialty writers, upset rates, and related types of special filings, the foregoing principles are generally applicable.

The practical effect of my argument is to say that no rate less than that previously approved for comparable business may be excessive. Such rate filings – whether by way of deviation or independent filings – should be examined only to see that they are adequate and not unfairly discriminatory.

Two points remain to be made. The first deals with the question of uniformity. In raising this issue, I mean it to include more than the question of rate uniformity, but alse the areas of rules, forms and procedures.

The stage is now being set for a striking of a balance between the successes and failures of state regulation. This balance will not be determined in such pleasant surroundings as these, but rather in a more formal atmosphere. As you have all read in the trade press, an Antitrust and Antimonopoly Sub-Committee of the U. S. Senate recently was authorized to inquire into the conduct of the insurance business with special reference to "alleged uniformity of insurance rates and pressure tactics of rating bureaus to achieve uniform rates."

It may very well be that the future of state regulation will turn upon the results of this inquiry. What is our position? Having been in the position of a rate approver, I am aware of the pressures for uniformity which exist. In saying this, I do not refer to any external forces – rather I have in mind that most of us like to bring a sense of orderliness and system to what otherwise might appear to be an untidy state of affairs. How does such a sense manifest itself?

There are a variety of ways. The "X" company solves a certain rating problem in a certain way. When the "Y" company appears in your office with a different solution, equally tenable, there is a very natural tendency to suggest to "Y" that its answer should be the same as that which you have already approved for "X". Or perhaps the bureau has an entirely different approach. Orderliness immediately suggests that both "X" and "Y" companies should be brought into line with the bureau—or perhaps the bureau with one of the companies. The rating laws have this to say for guidance:

> "Nothing in this article is intended . . . (2) to prohibit or encourage except to the extent necessary to accomplish the foregoing purpose, uniformity in insurance rates, rating systems, rating plans or practices."

With this as your guide, the answer becomes obvious – uniformity for the sake of uniformity is neither necessary nor desirable. At this advancing hour, I will not again belabor the point that competition is the best regulator other than to say that the best solution will endure – the others will fall by the wayside.

I sound this note of caution because upon the total of such decisions the case for state regulation may be won or lost.

Victor R. Hansen, Chief of the Antitrust Division of the U. S. Department of Justice, has recently adverted to some of the larger matters at issue.

Mr. Hansen said:

> "Recently there have been attempts in several states, either by proposed legislation or by state regulation to require complete uniformity in rates and forms . . . to the extent that the state imposes strict conformity upon the insurance industry and eliminates or greatly restricts the area for independent action in rates and methods of operations, to that extent the underlying purpose of the McCarran Act . . . which is to preserve and protect healthy competition in the insurance industry . . . becomes undermined."

There can be no mystery as to the states which Mr. Hansen had in mind. Certainly this is not the proper forum in which to try out the case in any event. But it is clear to me that even in states such as those which you represent, the existence of laws permitting competition are not enough – administrative belief and enforcement are also necessary.

My last point is one which Superintendent Vorys of Ohio adverted to in an address some days ago now. As reported in the trade press, Mr. Vorys made the point that "guts" were necessary in the insurance business. To this I say, "amen"! May I underscore the superintendent's comment by adding that "guts" are also necessary in the business of state regulation. One of the least popular tasks of the insurance regulator is the approving of rate increases. On this point I feel I can qualify as an expert having viewed this most difficult task from both sides of the desk.

First let us be clear that I do not urge the approval of increases which are not justified. But hesitation in regard to the approval of proper filings merely delays the day of reckoning and in many cases makes the final result more painful. By and large, I believe that auto rate increases are one day wonders. If the press is conditioned and fully informed, they will be helpful. So far as the public reaction is concerned, a flood of telephone calls the first day or so offer you a golden opportunity to drive home some of the basic truths in regard to frequency and severity. These you should welcome.

Legislative reaction may very well be mixed. However, I have never met a legislator who, willing to be fairminded, could not be convinced of the soundness of an approval. What's left? Well, for one thing there are those legislators who are against you when they find good cause, and equally opposed to you without cause. They just hate your guts! And this brings me back to Superintendent Vorys' point . . . it takes guts to do a proper job no matter on which side of the desk you sit. As a parting word of consolation, let me add that I never heard of an election won or lost solely because an increase was granted.

Earlier I referred to Mr. Dineen's famous thirteen fundamentals of conduct for an insurance department. Permit me, in conclusion, to summarize eight fundamentals as I view them:

1. The primary purpose of rate regulation is to protect the public.
2. The best protection against excessive rates, be they those of bureau or independent filer, is competition.
3. Competition in rules and forms results in better protection for the public.
4. Judgment has a legitimate place in rate-making and rate approving, since statistics are not always available nor do they always accurately foretell the future.
5. A profit factor is a tool useful only in assisting you to determine the propriety of a rate level proposed by those acting in concert.
6. No rate less than that approved for use by bureau companies can be held to be excessive.
7. Uniformity of rates, rules or forms cannot be forced upon an insurer.
8. Courage is an indispensable in the character of a rate regulator.

The Rule-Making Power and The Exertion of Judicial Leadership in the Field of Evidence Reform*

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I AM deeply flattered at being invited to participate in this discussion of the Uniform Rules of Evidence. I should like to develop two points: (1) the scope of the rule-making power in the evidence field; and (2) the obligation on the part of judges to exercise leadership in the field of evidence reform.

THE SCOPE OF THE RULE-MAKING POWER

An analysis of the cases, constitutional provisions, and statutes indicates that the sum total of the rule-making power consists of three elements: (1) inherent powers; (2) legislative confirmed powers; and (3) constitutional powers.

Inherent Powers. The power of a court to make rules to insure that trials are fairly and expeditiously carried on is inherent in a court. With the creation of a court, without further legislative or constitutional authorization, the judges have certain basic rights and duties. These include the obligation to see that the process of judicial administration is carried on fairly, expeditiously, and at a reasonable cost. As broad as this power is, it has never been clearly defined. It is logical to assume that each court has more power in respect to its own activities than it has to control the activities of another court. In other words, the Supreme Court has more inherent power to manage the appellate process of the state than it does to provide rules for the trial courts. Whether or not the Supreme Court has inherent power to make rules governing the trial courts will depend in part upon the nature of the state judicial system; i.e., whether it is created as a unified court system or whether it is a compartmentalized court system, each a separate court, an entity in and of itself.

Constitutional Powers. Four states—Maryland, Michigan, Missouri and New Jersey—have provisions in their constitutions granting to the Supreme Court the power to make rules of practice and procedure. Other states have no such express provisions.

Legislatively Confirmed Powers. Many states have passed statutes patterned after the Federal Act of June 19, 1934, confirming the power of the court, and legislatively establishing the obligation on the part of the court, to make rules of practice and procedure. These statutes often require that the court report the rules to the legislature, with the further provision that unless within a limited period of time there is a legislative veto, the rules will become effective. Whatever the source may be for the rule-making power, the key to determining the scope of that power, particularly in the field of evidence, are the words "practice and procedure." The constitutions use this term, the statutes confirming the rule-making power use this term, and the cases recognizing the inherent powers in the courts to prescribe rules, use this term to define and limit the full scope of the rule-making power.

DO EVIDENCE RULES FALL WITHIN THE TERMS "PRACTICE AND PROCEDURE"

Analysis of the Words "Practice and Procedure." Procedural law has been defined as "the method of enforcing rights or obtaining redress for their invasion," and as "the machinery for carrying on the suit." Practice has been defined as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to

*Address of Charles W. Joiner, Professor of Law, University of Michigan, before the Section on Judicial Administration and the Special Committee on Uniform Rules of Evidence for the Federal Courts, American Bar Association, in Los Angeles, California, August 26, 1958.

administer the machinery as distinguished from the product." Similarly, "practice includes the formula by which that power is first asserted and afterward exercised in respect to any litigation *in all its phases,* until the same is finally completed." As stated by the Illinois Supreme Court, the "proceedings and practice of the courts must be construed to mean the form in which actions are brought and the manner of conducting and carrying on suits."

An analysis of the words themselves as interpreted by the various courts leads to the conclusion that they embrace the entire area known as procedural or adjective law, or in other words, that they embrace all "how", leaving to the legislature "what" in establishing the substantive law of legal rights and duties. Thus in determining the scope of judicial rule-making power with respect to evidence rules, we must ask ourselves the question, "What is the purpose of the rule?" If the purpose of the rule is to permit the court to function efficiently, the court may exercise its rule-making power unless its impact is such as to conflict with other validly enacted legislative or constitutional policies involving other matters than the orderly dispatch of judicial business. In other words, we must examine the rule to determine whether or not it provides in part, a method or means of aiding a court to function in a way in which the court was designed to function; i.e., to promote justice fairly, expeditiously, and at a reasonable cost. If the rule does this, it is a rule of practice. If on the other hand, it is predicated on policies other than assisting a court to do what it was inherently designed to do, it will not be a rule of practice.

Most rules of evidence are predicated on methods devised over long periods of time and through trial and error aimed at "how to have a fair trial." Only a few, such as, for example, the doctor-patient privilege, are based on considerations not involved in the orderly dispatch of judicial business. On the whole, there can be little dispute over the proposition that rules of evidence are properly classified within the terms practice and procedure and thus within the rule-making power. In the last analysis, however, the court in determining its power to promulgate any rule of evidence must examine the policy behind the proposed rule to determine whether or not the purpose and effect of the rule involve the orderly dispatch of judicial business or is predicated on other broader policies of the state.

Historical Development of Evidence Rules on an ad hoc Basis. The fact that most evidence rules have been made by courts is persuasive as indicating that the courts have the power to create evidence rules. An analysis of any evidence textbook indicates that the basic ideas behind almost all of the evidence rules have come from the judicial decisions creating the rules. In other words, the courts have over the centuries established rules of evidence as a part of that great body of procedural law devised to carry out the courts' obligations to do justice fairly and efficiently, as expeditiously as possible, and at a reasonable cost. If the court can make evidence rules on an ad hoc basis, building up case by case a common law of evidence without the help of a legislature, there is no reason why courts cannot reach the same result through the adoption of rules of evidence, thus giving to the litigants the opportunity to know in advance what is the rule of evidence, rather than being able to find out only after the case is decided. Historically, rules of evidence have always been considered as practice and procedure and have been made by the courts.

Interpretation of Statutes Confirming the Rule-Making Power by the Power's Use. An analysis of the rules promulgated by the courts pursuant to an enabling act, such as the Federal Act of June 19, 1934, authorizing the courts to promulgate rules of practice and procedure, indicates that the courts have in many instances promulgated rules commonly thought to be within the field of evidence. The federal experience will stand as an example.

All evidence is received in the federal courts pursuant to a rule of court promulgated by the Supreme Court. Rule 43A states that evidence will be admitted in the federal courts if it is admissible under federal statute, under state statute, rule or common law, or under a federal equity practice. To be true, the detailed rules are not spelled out in the rule, but, the admissibility of evidence is governed by a rule promulgated by the Supreme Court. In fifteen other situations we find the rules of civil procedure touching upon or governing matters commonly thought to be within the field of evidence. Thus we can see

that the courts when acting pursuant to such confirmatory legislation, are promulgating rules of evidence.

THE OBLIGATION OF JUDGES IN THE FIELD OF EVIDENCE REFORM

The Nature of the Litigious Process. In our adversary system, the responsibility for keeping the wheels of justice running smoothly is divided between the practicing lawyers and the judges. However, as a practical matter, heavy reliance must be placed upon the judges to initiate and carry through many of the reforms so necessary in the field of evidence. The lawyers are primarily advocates. They see problems through the eyes of their clients. In the field of evidence reform, the trial advocates often tend to view proposals for revision of evidence rules with jaundice eyes of partisan clients. They have knowledge of present evidence rules and are well indoctrinated in what these rules will do for their clients that they have difficulty separating the promoter of sound judicial administration from the hard-driving trial advocate. To ignore the judges and rely solely upon lawyers to initiate and carry through evidence reform would be to discard a most useful set of opinions, a large number of willing hands and some of the most competent legal minds who have been called to the bar. The judges, although only part of the adversary process, play an important part in that process and must carry the laboring oar in bringing forth reform in the field of evidence.

The word "administration" in the phrase "judicial administration" has never been sufficiently emphasized. It is not only the function of the judge to resolve disputes fairly, it is also his function, his prime function, to see that these disputes are resolved with reasonable dispatch, at a reasonable expense, and that modern ideas, devices and technology are made available to litigants in the resolution of these disputes. The judge has the responsibility to see that the rules of evidence are kept in time with the times and advancing technology and to see that the evidence on which people ordinarily rely in the conduct of their business is made available to the fact-finders in resolving disputes. Nothing else is so important in the resolution of disputes than the rules by which the judge admits evidence. Nothing should challenge the judge more than the study of ways and means of improving the rules of evidence. The litigious process itself and the obligation on the part of the judge to supervise it, to see that it operates smoothly, and on occasion, to act as an architect and engineer for the drafting and preparation of new machines and devices to help in the resolution of disputes, indicates the need for action on the part of the judge to improve the field of evidence.

Judicial Leadership Now. It is particularly important that leadership be exercised by the judges now, for the lawyers have done their work. (1) All of the great authorities in the field of evidence have urged evidence reform and evidence codification. (2) The lawyers of the American Law Institute have prepared a Model Code of Evidence. (3) The lawyers representing the various state governments, the Commissioners on Uniform State Laws, have prepared a set of Uniform Rules of Evidence. (4) The lawyers of the American Bar Association have approved this draft of Uniform Rules of Evidence.

In other words, the spade work is done. The job now is for the judges to act and promulgate the Uniform Rules of Evidence for the courts in which they sit. If the supreme court of a state has rule-making power, that court should promulgate rules of evidence for the state courts. If, on the other hand, the supreme court of the state does not have rule-making power, with certain limitations it is within the power of each of the judges of the circuit or district courts to indicate that within his own circuit or district the Uniform Rules of Evidence shall be controlling.

The judges are the ones in this country who have the power in the evidence field to improve a system of judicial administration to avoid criticism such as the following: "Herein it is charged that the legal system in each of the states not only fails to administer even-handed justice to all, but that it has been completely subverted from its real purpose as actually to initiate and multiply injustices. I submit that the American judicial system as fashioned and operated today constitutes the most devastating failure of modern times. No other governmental function anywhere in the world costs so much and delivers so little as does the American judicial system." Callison, *Courts on Trial.* Of course, we know that this statement is not true, but

the fact that it is made, the fact that other people are making pointed, though less damning, statements on the subject, indicates that we have a very real challenge before us. I am sure that the Section of Judicial Administration of the American Bar Association would assist any judge attempting to obviate such criticism by promoting the promulgation of uniform rules of evidence.

Special Obligation of Federal Judges. It seems to me that in order to have uniform rules of evidence, the value of which has been demonstrated here today, leadership in the field of evidence reform is needed with a very broad base. That reform can come more rapidly and more effectively if the judges in the federal courts will assume the leadership in this drive. Although isolated attempts at reform in the various states will have some substantial value, the real improvement in the law of evidence will come more rapidly if the federal courts will adopt the uniform rules of evidence under the Act of June 19, 1934. If the federal courts accept the challenge, and promulgate rules, state after state will follow in much the same manner they followed the reform in other procedures after adoption of other federal rules. The adoption of rules of evidence by the federal courts will be of great benefit to lawyers practicing in the federal courts, but of even more importance, they will benefit the practice in every county seat throughout the land. For as sure as it is possible to predict anything, federal adoption of the Uniform Rules of Evidence will presage adoption in virtually every bailiwick in this country.

All that is needed is for the Supreme Court to act under its rule-making power. If the federal judges were to insist on the promulgation of uniform rules of evidence we would first of all have uniformity of evidence rules throughout the federal districts and as rapidly as each of the states adopted the Uniform Rules of Evidence (which by the way were urged initially by the states through the Commissioners on Uniform State Laws) we would have uniformity of evidence rules throughout the country as a whole in all of the courts. Then it would make no difference where a cause of action arose, or under what system of procedure the cause of action was to be tried, or by what set of rules, or who was to act as the advocate, or what judges would sit. Within the limits of personal differences, the same proof would be admitted and the same even-handed justice would be meted out in the case, wherever tried.

I am embarrassed to plead with you in this way. I urge you to act, you who are judges—you who are lawyers—interested in improving judicial administration. I urge you not as a brash theoretical law teacher, but as an humble servant of the courts and the law. The movement for evidence reform needs leadership. The movement for evidence reform needs soldiers. It has the ammunition, it has prepared the battle plan, but it needs those of you who see the necessity of reform, the lawyers and judges, to stand up and be counted in your own states and before your own courts. You are the people who can make this project successful. Do what you are capable of doing.

Federal Rule 13—A Trap In Declaratory Judgment Actions

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LIABILITY insurers who have often taken advantage of federal declaratory judgment procedure in the past should now be aware of a dangerous pitfall in the form of Federal Rule 13.

As an illustration, in a rather freak accident occurring recently in a large midwestern hospital, a 12 hour old infant sustained burns and possible an electric shock. Several days later the infant had one of its legs amputated due to a circulatory deficiency. Alleging a causal relationship between the accident and the loss of the infant's leg, the parents filed suit in state court against the hospital.

The liability insurance for the hospital was divided between two carriers, one providing OL & T coverage with high limits and the other malpractice coverage with rather low limits. A controversy subsequently developed between the insured and the two carriers as to which insurance policy provided coverage for this incident. To avoid what it felt would be an unnecessary involvement in an expensive and complicated law suit, the O. L. & T. carrier filed a declaratory action in federal court against its insured and the plaintiff, alleging that this claim arose from malpractice, a hazard excluded under the O. L. & T. policy.

The plaintiff's attorney expressed his gratitude for having been brought into federal court, and promptly filed a cross claim against the hospital under Federal Rule 13 (g) for injuries sustained by the infant.

The court subsequently upheld this application of Rule 13 in over-ruling a motion to dismiss the cross claim. The court further suggested during a pre-trial conference that all issues could be decided in a single trial, the coverage question to be resolved on the basis of special interrogatories submitted to the jury.

Everything the insurer had hoped to gain by filing the declaratory action, and there was good authority and precedent for such action, was swept away by the effect of Rule 13.

Actually, the insurer was in a much worse position. Not only was it a party in a large damage suit, but found itself in the middle of a conflict of interests situation where it was both defending and opposing its insured in the same trial.

Prior to the application of Rule 13, a declaratory action had been considered a useful method for the insurer to obtain an advance adjudication of its rights and liabilities under an insurance policy.

"Insurers find great advantage in segregating the factual issue of coverage or breach by the insured and obtaining a declaratory judgment in an independent action to the effect that there was no coverage under the policy or that the company's defense was sound and exonerated it from further participation in the case. Not only is the company relieved by a judgment in its favor from defending a negligence action against the insured, but the determination of the fundamental economic fact that there is no coverage enlightens and guides the injured person and the insured."[1]

Professor Moore, in his comprehensive study of federal practice, states that the declaratory judgment action has often times provided a much needed method by which an insurance company may secure an *advance* determination as to whether or not it would be liable if judgment were rendered against the insured.

This all sounds very good until we apply Federal Rule 13. The results then become interesting but hardly advantageous to the insurer.

Federal Rule 13 is entitled, "Counter Claims and Cross Claims." There are several subdivisions to the rule, but only two are most pertinent to the insurer's problem, 13 (a) and 13 (g).

*Attorney, Lumbermens Mutual Casualty Company.

[1]Borchard, Declaratory Judgments, 1941.

13(a), "Compulsory Counter Claims.—A pleading *shall state* as a counter claim any claim which at the time of serving the pleading, the pleader has against any opposing party, IF IT ARISES OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER OF THE OPPOSING PARTY'S CLAIM, and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced, the claim was the subject of another pending action". (Emphasis added)

13(g), "Cross Claims against Co-party.—A pleading *may* state as a cross claim any claim by one party against a co-party *arising out of the transaction or occurrence* that is the subject matter either of the original action or of a counter claim therein or relating to any property that is the subject matter of the original action". (Emphasis added)

As far as jurisdiction is concerned, the majority rule is that compulsory counter claims and cross claims are ancillary to the main action, and if jurisdiction of the court in the main action is based on diversity of citizenship, the compulsory counter claim and cross claim will be supported by this jurisdiction even though said counter claim or cross claim may be between residents of the same state.

The general purpose of Rule 13, and the courts continually stress this, is to effect a speedy settlement in one action of all the controversies between the parties. A defendant who has any claim against the plaintiff or a co-defendant is permitted to assert a counter claim or cross claim, thereby avoiding circuity of action. It is immaterial whether the counter claim or cross claim is legal or equitable or in contract or in tort.

As one can see, this concept is opposed to the idea of a declaratory judgment suit filed by an insurance company to get a prior determination of its liability under a policy in a separate lawsuit.

The most important qualification of Rule 13 (a) — compulsory counter claims, and 13 (g) — cross claims, is that they must arise out of the transaction or occurrence that is the subject matter of the main controversy. This qualification represents the nub of the problem to the insurance company seeking prior and separate declaratory relief as to coverage.

It is important to understand what is meant by this qualification. According to Moore, an all-embracing definition cannot be given, nor is one desirable. The same flexibility and same impirical treatment is necessary in connection with "transaction or occurrence" that has been advocated and discussed in connection with "cause of action".

In *Douglas v. Wisconsin Alumni Research Foundation*,[2] the court declared that, "Where essential facts alleged by plaintiff enter into and constitute in part the cause of action stated in defendant's counter claim, the fact that they are not precisely identical or that the counter claim embraces additional allegations is immaterial in determining whether a compulsory counter claim exists".

In *McArthur v. Moffett*,[3] the court stated that, "The words are general to the last degree; indeed they must be so, for they are intended to provide for and apply to the myriad difficulties that may arise between man and man in all kinds of situations, and no words of limited or narrow meaning could be used."

Simplifying this, if there are several issues present in an action, and one of these is common to both the main controversy and a counterclaim or cross claim, the counterclaim or cross claim will be held proper.

These citations represent the weight of opinion in both federal and state courts. They reflect the desire to uphold the propriety and jurisdiction of counter claims and cross claims in every possible kind of action, including declaratory judgments.

Can we say, then, that a cross claim in tort by an injured third party against the insured is proper in a declaratory action brought by the plaintiff insurance company which is seeking to avoid coverage under its policy? In other words, does the tort action arise out of the occurrence or transaction which is the subject matter of the insurance company's claim? The insurance company would certainly argue that the cross claim was improper. They would quote Mr. Borchard to the effect that, "The liability under the policy and

[2] 81 F. Supp. 167 (1948) (Ill.)
[3] 128 N.W. 445 (1910) (Wis.)

the liability for negligence are indeed two separate transactions".

In addition to the hospital case which is still pending, there are few actual cases bearing on this point. However, only one of them is in favor of the insurance company, holding that a cross claim for injuries is improper. In only three cases was there any reference made to Rule 13.

The only case holding a cross claim of this type to be improper is *Hoosier Casualty Company v. Fox.*[4] This case arose out of an automobile accident in Iowa. The plaintiff insurance company had issued a liability policy to A, who subsequently had an accident in which two of his passengers, B and C, were injured. A, B, and C were all citizens of Iowa and the plaintiff insurance company was an Indiana corporation. Alleging that the policy was obtained through a fraud, the insurance company brought a declaratory judgment action against A, B and C to establish its nonliability. The injured co-defendants, B and C filed counter claims against the plaintiff insurance company, and cross claims against A, insured driver of the automobile.

Under Iowa law, B and C had no direct right of action against the insurance company. The court held that under the doctrine of *Erie Railroad v. Tompkins,* it would be improper for the federal court to permit the injured parties to assert a direct claim against the insurance company when it was not permitted under Iowa law. As to the cross claim, the court held that if they arose out of the transaction or occurrence which gave rise to the main action, then the court would have ancillary jurisdiction over the cross claims. In this case, the subject matter of the main claim was the issue of fraud in procurring the policy. The subject matter of the cross claim was the automobile accident and the alleged liability of A. The court dismissed the cross claim holding that the facts and circumstances with respect to the claim and the cross claim were quite different. The court quoted Borchard to the effect that the liability under the policy and liability for negligence were two separate transactions.

In *Merchants Indemnity Corporation v. Dana, et al.,*[5] the insurance company brought a declaratory judgment action to determine whether actual use of the auto by defendant O'Connor, an employee of the named insured, defendant Dana, was with the *permission* of the named insured. Co-defendants, Kailler, Casey, et al., filed counter claims against plaintiff's insurer on its policy for injuries and also filed cross claims against co-defendants Dana and O'Connor.

Surprisingly enough, the insurance company did not object to the direct counter claim against it, nor did it object to the cross claim against its insured claiming that it was a separate transaction from the coverage isssue. Instead, it asked that the pleading to the counter claim and cross claims be deferred until determination of the issues on the coverage question. The company claimed to be placed in the anomalous position of opposing defendant driver O'Connor and also defending him in the same trial, or, in the alternative, refusing to defend him and risking a breach of contract.

The court in denying the insurance company's motion, stated that it was the company's own choice which created the anomalous situation in which it now found itself; that the declaratory action should not unduly delay the determination of the rights of the injured parties.

Most significant of all, the court stated that all the issues could be disposed of in one action and the advantage to the plaintiff insurer of a prior declaration of rights would seem to be outweighed by the economy of time, of parties, witnesses, court and jury, of disposition of all issues at one trial.

The court made no mention of Rule 13 (a) or (g), or whether the counter claim or cross claims arose out of the transaction or occurrence that was the subject matter of the insurer's action.

In *Ohio Casualty Company v. Maloney,*[6] the insurer had issued a policy covering trucks owned by the insured, Keystone Dairies, Inc. Defendant Maloney, while driving one of these trucks, was involved in a collision with two other autos resulting in injuries to several people. The insurer brought a declaratory action against defendant Maloney and defendant injured parties, asking for a decree that its policy did not insure Maloney. Certain of the injured defendants sought to bring in the in-

[4] 102 F. Supp. 214 (1952) (Iowa)
[5] 8 F.R.D. 32 (1948) (Conn.).
[6] 3 F.R.D. 341 (1943) (Pa.).

sured, Keystone Dairies, Inc., as the third party defendant, by means of a counter claim for injuries, on the basis that defendant Maloney was agent of the dairy at the time of the accident. You will note in this situation that the action for injuries was really a counter claim rather than a cross claim because it was brought against an opposing party, that is a third party plaintiff against a third party defendant.

The court upheld the counter claims, holding them to be compulsory under Rule 13 (a). Quoting from the opinion, "I think it can fairly be said that the transaction or occurrence set forth in the counter claim is of the subject matter of plaintiff bill".

In commenting on this case, there was no mention in the opinion as to the facts underlying the insurer's desire to avoid coverage. There is no way of reconciling the court's opinion that the counter claims arose out of the transaction or occurrence that was the subject matter of the declaratory action.

In *U.S. F. & G. Co., v. Janich, et al*,[7] the plaintiff insurer issued a public liability policy to Peter Janich, Sr. and Peter Janich, Jr., dba Sanitary Construction and Engineering Company. During certain construction work there was an altercation between Janich, Jr. and one Max Berrey resulting in injuries to the latter. Berrey filed suit for injuries in the state court. Plaintiff insurer filed declaratory action seeking relief as to its liability under its policy, naming the insured and Berrey as co-defendants. Defendant Berrey then filed a counter claim against plaintiff insurer and cross claims against Janich, Sr. and Jr., for injuries received. Plaintiff insurer filed motions to dismiss the counter claim because of the no action clause in the policy and to dismiss the cross claim because there was no diversity of citizenship between cross claimants, and therefore the court was lacking in jurisdiction.

The court held, first as to the counter claim, that the insurance company had waived its right to plead the no action clause by naming the original claimant as a co-defendant; that the claimant had a right to maintain his status as a claimant by filing his counter claim against the insurer. As to the cross claim, this was also upheld by the court on the basis that jurisdiction of the federal courts depends on the state of the record at the time that the action was brought, and having jurisdiction, it cannot be ousted. The ruling, at least as to the counter claim against the insurer, can be criticized, and it certainly was in the *Hoosier Cas. Company* case where *Erie Railroad v. Tompkins* was applied to knock out the counter claim against the insurer.

As to the cross claim, it is rather surprising that neither the plaintiff insurer nor the court made reference to Rule 13 (g). Certainly if the cross claim arose out of the same transaction or occurrence as the original claim, no independent grounds of jurisdiction need exist.

In *Collier v. Harvey*,[8] Employers Mutual Casualty Company had issued an auto policy to Harvey. It was subsequently alleged that Harvey had loaned one of his trucks to the City of Seminole under the direction of the street superintendent for the purpose of setting electric light poles in the ball park of the city, and that such use of the truck was not within the coverage of the policy. Collier brought an action against Harvey in the state court for injuries arising out of an accident alleging that Harvey was responsible for the operation and control of the truck. The insurance company subsequently brought a declaratory action in the federal court alleging that the use of the truck at the time of the accident was not within the coverage of the policy. In this case, which is different from the previous ones I cited, it was the insured who filed the counter claim and cross claims rather than the injured third party. The insured, Harvey, filed his counter claim against the insurance company alleging that they were bound to cover him for this accident on the basis of the allegations made in the injured party's complaint. At the same time, Harvey's cross claim was directed against the injured party alleging that he, Harvey, was not responsible for the use of the truck at the time of the accident.

The court properly held that the cross claim and counter claim arose out of the occurrence that was the subject matter of the main action. In other words, all claims concerned the status of the insured vehicle at the time of the accident in question. Also, the counter claim and cross claim were not in the nature of tort actions for injuries, but for declaratory relief which

[7] 3 F.R.D. 16 (1943) (Cal.).

[8] 179 F. 2d 664 (10 Cir., 1949).

was identical to the issue raised by the insurance company. I might point out that the courts in some jurisdictions would throw out this declaratory action by the insurance company entirely, holding that this issue could be resolved in the action pending in the state court.

One additional case may be cited to illustrate how the federal courts favor consolidation of all parties and issues into a single trial. The case is different from those where the declaratory action is brought by an insurer seeking to avoid coverage. But it does emphasize how the court will combine more than one cause of action if there is a common issue present; or, to put it in another way, if one claim arises out of the same transaction or occurrence that is the basis of another claim.

The case is *Eichinger, et al., v. Fireman's Fund Insurance Company, Home Insurance Company, and Thomas Ryan, Contractor.*[9] Plaintiff was owner of a grain elevator which was destroyed by an explosion. The defendant fire insurance companies had denied coverage to the plaintiff. In a single action the plaintiff filed suit against the insurers on the contract and also against a contractor, Thomas Ryan, charging negligence in the design and construction of the elevator.

The defendant insurers could have filed cross claims against the contractor but instead moved for separate trials, objecting to being compelled to defend against the claim of plaintiff in a single trial during which the defendant contractor, Ryan, was also being proceeded against by the same plaintiff.

The court denied a motion for separate trials. Quoting from the opinion, "Within the concept and understanding of the federal rules there is the impalpable suggestion that a single submission of all the issues in a civil action should be favored rather than their resolution in piecemeal trials. If two trials should be had, one limited to issues against the insurance companies and the other to those against defendant Ryan, much of the greater part of the evidence would have to be adduced in both trials. Here, along with the character and extent of damage, the *cause of the damage lies at the heart of each claim,* one against the insurance company and one against the contractor Ryan."

[9]20 F.R.D. 204 (1957) (Neb.).

And, going back to the declaratory action brought by the O. L. & T. carrier against the hospital, the court in denying the motion to dismiss the cross claims, stated as follows:

> "It seems obvious that the occurrence which is the subject matter of the original action and of the cross claims is the same. It is the accident which caused the injuries to the infant plaintiff. The same evidence relating to the cause of the accident must be examined in order to determine both issues which are respectively presented by the complaint and the cross claims".

The only case I have discussed where the cross claims were held to be improper, the *Hoosier Casualty Company* case, is given a very narrow construction by the court. Its application is limited to those declaratory actions based upon the fraudulent procurement of a policy as being an entirely different transaction from the accident itself.

The question may be raised, "Why not omit the injured parties as defendants in the declaratory action thus eliminating the possibility of a cross claim for injuries being filed against the insured?" In going over the cases and authorities on this point, it is apparent that this procedure, if not impossible, would be very unwise for the insurance company to follow.

Appleman states that, "Persons who have been injured in an automobile accident are certainly proper parties to a suit by the liability insurer to determine the coverage of its policy, and the better rule would seem to be that they are both proper and necessary parties to the maintenance of the suit."

In *Maryland Casualty Company v. Pacific Coal & Oil Company,*[10] commenting on the omission of the injured party as a co-defendant, the court said, " . . . it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca (the injured party) might determine that petitioner (insurance company) was not obligated under the policy, while the state court in a supplemental proceeding by Orteca against petitioner might conclude otherwise." In other words, after the injured party obtains a judgment in the

[10]312 U. S. 270 (1941).

state court and then brings a garnishment action against the insurer, the state court is not bound to follow the federal court's decision.

In Moore's *Federal Practice*, No. 57.19, the statement is made, " . . . that in many of the liability insurance cases the most real dispute is between the injured third party and the insurance company, not between the injured and an often times impecunious insured."

Decisions in two federal circuits, third and fifth, hold that the injured person is both a proper and necessary party. Being at least a proper party, there is nothing to prevent the injured party, if he is aware of the pending suit, from intervening under Federal Rule 24 and filing his cross claim. Or, if injured party is unaware of the pending suit, there is nothing to prevent the court from ordering him to be brought in under Federal Rule 13 (h).

It is probably safe to conclude from all this that the insurance company's decision to file a declaratory action should be governed to a large extent by the type of coverage question involved. If the question arises from a certain exclusion, definition of hazard, or insuring agreement that is related in any way to the facts leading up to the accident itself, or cause of it, the insurance company may find itself not only defending a damage suit but also named as a direct party thereto—certainly in a much worse position than they were before bringing their declaratory action.

On the other hand, if the coverage issue relates to the issuance, existence, cancellation or expiration of the policy itself, they apparently can rely on the *Hoosier Casualty Company* case.

Although this subject of cross claims and counter claims has been confined to federal procedure, there apparently is no reason why the insurance company would not face the same dilemma in many of the state courts whose rules of pleading are as liberal as the federal courts.

Defendant May Bring Joint Tort Feasor Into Court With Plaintiff Although Plaintiff's Action Is Barred

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THE topic of this comment can best be pointed up by an assumed state of facts: P sustained injuries in a collision proximately caused by the active negligence of D-1 and D-2. For some reason, immaterial here, P sues only D-1 in his action to recover damages. Our problem concerns only the rights of D-1 as against D-2, where P's direct action against D-2 is now barred by the statute of limitations. May D-1 by appropriate proceedings join D-2 in P's lawsuit so the entire question of liability for P's injuries can be litigated in one suit; or must D-1 make a reasonable settlement or go to trial, have a judgment taken against him, satisfy the damages by payment and then proceed against D-2 for contribution.

Although not within the scope of this comment, it is probably desirable to define the oft-confused terms "contribution" and "indemnity". Contribution is the right of one tort feasor by whom the damaged claimant has been satisfied to recover as against another tort feasor whose acts concurred in the damage to P its share of the satisfaction paid to P by the paying tort feasor. On the other hand, indemnity lies where a party primarily liable is required to reimburse the one who satisfied the damaged claimant. Indemnity has been spoken of as "full contribution"[1] and indeed the terminology is quite descriptive. Insofar as contribution and indemnity are concerned, the general rules[2] relating to the statute of limitations are that the paying tort feasor's cause of action therefor does not arise until he has paid more than his proportionate share of the loss.

The cause of action of the paying tort feasor against his joint tort feasor is not to be confused with any cause of action P may have against the other tort feasor, which cause of action of P's has become barred by the statute of limitations. The paying tort feasor's cause of action arises not from the damage to P but rather from the paying tort feasor's having borne more than his fair share of the loss.

When the suit is filed and pending D-1 is only confronted with the prospect of being compelled to bear an unjust proportion of the loss; wherefore, it can well be argued that D-1 has no cause of action as yet against D-2. At common law, there was no right to contribution as between two persons whose concurring actions had caused injuries to another and one of the wrongdoers had been compelled to discharge the liability thereby incurred[3]. This was so because the common law left the wrongdoers where it found them as between themselves; however, the common law rule has been largely abrogated by statutes in the various jurisdictions which generally permit contribution among such tort feasors.

Assuming that the paying tort feasor could recover in his action for contribution, i.e., assuming that in the jurisdiction involved there is a right to contribution, the primary inconvenience to the paying tort feasor may lie in his having to bear the burden of paying the entire judgment and then bringing a separate suit to recover the amount in excess of what he should bear. Furthermore, when P is satisfied there is the possibility that D-1 through no fault of his own will be in worse position to prove that D-2 was negligent and hence liable to P. It is readily

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[1]16 Tex. B. J. 199.

[2]20 A.L.R. 2d 925, 926. 13 Am. Jur. Contribution Sec. 88, p. 77. But in Texas, the rule has been followed that prior payment by the co-obligor of more than his proportionate share of a common debt is not a condition precedent to an action for contribution or indemnity between active and passive joint tort feasors, regardless of whether such relief is sought in original suits between them or by cross actions in suits by injured parties. See *Barton v. Farmers State Bank* (Com. App., 1925) 276 S.W. 177.

[3]13 Am. Jur. Contribution, Sec. 37, p. 34.

apparent that from the sued tort feasor's standpoint, it would be desirable to implead all parties who might be liable and dispose of all issues in one suit.

It is nearly impossible to generalize about the topic under consideration here since the right of a paying tort feasor to implead other tort feasors is largely dependent upon rules of civil procedure, and other statutes peculiar to the jurisdiction.

Since this paper does not purport to be an exhaustive analysis of the law of the forty-nine jurisdictions, it is thought that the best presentation would be a discussion of the views taken by several representative states. In those jurisdictions which do not permit contribution, it is clear that no procedure would be available to D-1, whereby D-2 would be joined in the lawsuit since so permitting would destroy the rule of no contribution. That the statute of limitations may have run as between P and D-2 does not affect D-1's right to implead D-2[4] since, as indicated earlier, D-1's right to implead is not based on P's cause of action but rather on his own independent cause of action for contribution.

Before D-1 is permitted to implead, two statutes or rules must exist: A procedural one whereby it is possible to so implead and a substantive one permitting contribution. The balance of this paper proceeds on the assumption that both statutes are in existence.

In several states, Wisconsin, South Dakota and Missouri,[5] the statutes are merely permissive, i.e., it is within the sound discretion of the trial court whether the additional defendant will be impleaded. In such a situation, the general test is whether substantial justice requires that all parties appear in the same cause and there have the question of liability settled as among themselves. It would seem that in virtually every case, substantial justice would require that all parties be present in one lawsuit since there are factual issues which must ultimately be decided as among all parties.

In other States impleading is allowed if such action will not hinder or prejudice P's claim. The usual reasons given for saying that the impleading procedure will hinder or prejudice P's claim are: (a) The delay usually attendant upon bringing a new party into a suit, i.e., the time required to cite the new party, the time allowed him to answer, etc., and (b) the danger that the issues as between the two joint tort feasors will assume such proportions as to obscure, to P's harm, P's issues in the lawsuit. In Texas this matter is decided by the Court.[6] In South Carolina and West Virginia impleading is never permitted over the protest of the P.[7]

Louisiana and New York, though allowing contribution, never permit the joinder of a joint tort feasor whom the plaintiff does not elect to sue.[8] These holdings are based on the specific wording of the statute. However, New York will permit such a joinder if P expressly consents thereto.[9] Presumably, any jurisdiction with a right to contribution would permit impleading if P consented.

Since *Erie R. R. v. Tompkins*,[10] it is settled that the federal courts are bound by the substantive law of the states wherein they sit; however, they are not bound by the state procedure rules. Thus, where in a given state there is a substantive right to contribution, under the Federal Rules of Civil Procedure, such a joint tort feasor may be impleaded notwithstanding that

[4] 8 A.L.R.2d 139, Sec. 70. *Godfrey v. Tidewater Power Co.*, 223 N.C. 647, 27 S.E.2d 736 (1943) *Shaw v. Megargee*, 307 Pa. 447; 161 A. 546.

[5] *Wait v. Pierce*, 191 Wisc. 202, 209 N.W. 475, 210 N.W. 822 (1926); *Fusfield v. Smith*, 66 S.D. 309, 282 N.W. 523 (1938); *State v. Dinwiddie*, 358 Mo. 15, 213 S.W.2d 127 (1948). The Missouri statute although providing that joinder is within the discretion of the trial court, has been construed by the courts so as to permit joinder only if plaintiff is willing to accept the added party.

[6] *Lottman v. Cuilla*, (Tex. Com. App., 1926), 288 S.W. 123. Although literally construed, the Texas statute does not permit contribution except in those instances where one tort feasor has completely satisfied a judgment against him, by judicial interpretation it is well settled that a joint tort feasor may be impleaded in a lawsuit at the instance of the sued tort feasor provided such procedure will not prejudice plaintiff's claim.

[7] *Simon v. Strock*, 209 S.C. 134, 39 S.E.2d 209 (1946) sets forth the rule that a defendant may not take away plaintiff's right to elect whom he will sue. *Rouse v. Eagle Convex Glass Co.*, 122 W.Va. 671, 13 S.E.2d 15 (1940), in the face of a statute which permits impleading when substantial justice can be done in no other way, refuses to permit impleading since it could result in forcing upon plaintiff undesired litigation.

[8] *DeCuers v. Crane Co.*, (La. Ct. App. 1949), 40 So.2d 61. *Fox v. Western New York Motor Lines, Inc.*, 257 N.Y. 305, 178 N.E. 289 (1931).

[9] *McLaughlin v. City of Syracuse*, 56 N.Y.S.2d 594, 269 App. Div. 382 (1945). *State v. Dinwiddie, supra*, footnote 5.

[10] 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817.

under the state's procedural rules joinder is not permitted.[21]

It is probably accurate to say that a failure to implead where permitted would never deprive the paying tort feasor of his right to bring a subsequent suit for contribution.[22]

Where the right to contribution among joint tort feasors exists as a matter of substantive law, it is believed that, for the purposes of avoiding multiplicity of suits and of relieving the sued defendant of the burden of having to be sued alone, satisfy the judgment and then bring a separate suite for contribution, joinder of a joint tort feasor should be allowed as a matter of right notwithstanding the fact that P's claim against one of said joint tort feasors has become barred by the statute of limitations.

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[21] *Kravas v. Great Atlantic & Pacific Tea Co.*, (1939, D.C. Pa.) 28 F. Supp. 66.

[22] *Union Paving Co. v. Thomas*, 9 F.R.D. 612. *Sattelbergerv. Telep*, 14 N.J. 353, 102 A.2d 577.

How The Claim Departments Can Help The Trial Attorneys Combat NACCA*

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THE National Association of Claimants Compensation Attorneys has done quite a commendable job in emphasizing the use of demonstrative evidence in the trial of damage cases. The use of demonstrative evidence is not new to the trial of lawsuits. It has been utilized in one form or another by both plaintiffs and defendants for many, many years. In addition to emphasizing the use of demonstrative evidence, the methods used in connection with the actual trial of the cases, such as being humble, being conservative, being honest before the jury, is publicized—this likewise is **not** new to the extent of being used only by NACCA. It is to a certain extent new to both plaintiff and defendant as being used and emphasized in the last decade. Prior to that time the prevailing attitude of both plaintiff and defense counsel was more toward the aggressive side. All of this is brought about by the changing times, better juries and a better understanding of human nature.

There is no reason why NACCA should strike fear and trembling in any of us who sit on the so-called "hot" side of the courtroom. To me there is a definite challenge to those of us who are in the defense of personal injury cases, from the heads of the claim departments down through all of the different phases of the handling of claims, the adjuster, defense counsel, and others who may play an important role in the handling of claims for the insurance industry. If we approach the problem with a basic concept of the administration of justice in our system of jurisprudence, that our courts are fair and impartial, that our juries are made up of citizens who are fair and honorable and who will sit as impartial judges of the facts, then in the light of that concept it is our duty to bring to the courts and juries truth, because justice can prevail only in the light of truth and that should be the guiding star to all of us. Particularly do I emphasize this insofar as the adjuster's role is involved, because he is the one who is first on the scene on behalf of the insurance company involved, and he should gather the facts with due diligence, guided, as I have said before, by the star of truth. He must be thorough, utilizing his imagination and ingenuity in finding the facts with which we will re-enact as completely as is humanly possible the occurrence out of which ultimately will develop the litigation that will be defended by the trial attorney before the court and jury.

The first time a trial attorney usually sees the file is when the summons and other suit papers are served on the defendant and they are brought to his office by the adjuster or sent to him by mail with the file. The trial counsel is rarely, if ever, consulted about the investigative phase of the file. It may be unnecessary that he be consulted in 90% of the files handled, but it is the other 10% where the ultimate cost to the insurance company client is so heavy. If, in that small percentage of cases, the claim department of the home office gave the adjuster instructions or permission to consult with the trial counsel to review his file and to make suggestions as to what further investigation might be needed, that would be helpful in defending the ultimate litigation and it would go a long way in assisting the trial attorney to combat NACCA with facts that might otherwise, prior to the trial, fade out of the picture, to the irreparable damage of our insurance clients.

Accident files may be divided into many classes, as for example, minor property damage, major property damage, minor BI, major BI, and others, all of which may be roughly divided into two groups, liability and non-liability on the part of the assured.

In considering the classifications, the adjuster who makes the initial contact must give more than a passing consideration to what appears to be a minor property dam-

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age claim. I venture the statement that everyone in this convention has examined what appeared to be a minor property damage claim, with damage to the front bumper and damage to the rear bumper and the rear deck lid totalling less than $100.00, resulting in a very substantial payment for personal injuries to an occupant and driver of the front vehicle, because no one recognized the potential personal injuries involved. Likewise, files that we consider minor BI are likely to be neglected because we fail to sense the hidden danger of it developing into a major bodily injury. In those relatively rare instances where there is absolute, fixed liability from the standpoint of the facts and involving severe injuries and damages, it is unnecessary to spend much time and money to investigate the facts, get statements from the witnesses, etc., only sufficient to determine that there is absolute fixed liability on the facts and obtaining sufficient medical information from reputable physicians and obtaining the special damages to evaluate the file for settlement purposes is sufficient.

It is with the cases that begin in the twilight of liability and to those many files that fall into the various shades of light of liability to the bright sunshine of complete non-liability with which we will concern ourselves primarily, because those cases are the ones that most likely result in suit and actual trial. However, before passing on, it is suggested that sufficient investigation be made, in the form of written statements, photographs, and other factual data, not only to satisfy the adjuster in the field of absolute fixed liability, but to likewise satisfy any disinterested person. The investigation, insofar as the facts are concerned, may be stopped at that point.

In those cases of no liability, the investigation should be commenced and completed as promptly as is possible. Where there are serious personal injuries and death involved, in this day and age we can expect suit to be filed regardless. At least we must base our actions on that presumption, which will be safe many more times than it would be to assume otherwise.

An example of the cost of failure to complete an investigation of a claim falling in the category that we are going to discuss occurred in East Tennessee, and it fell the lot of the firm of which I am a member to defend the litigation. We did not see the file until the suit papers were actually served on the assured and sent to the company, who in turn sent them to us. The accident occurred in one of the many inter-state highways running through East Tennessee. A tractor-trailer unit was involved. A passenger vehicle, being operated by a non-resident, occupied by two non-resident individuals, collided with the tractor-trailer unit, which resulted in the immediate death of one of the occupants, death within a matter of weeks of another occupant and a serious injury to the third, and a complete destruction of the passenger vehicle. The tractor-trailer unit was badly damaged but the driver escaped with minor scratches and bruises. He was in condition to immediately call his boss by telephone, who in turn immediately called his insurance carrier, who in turn immediately called its adjuster in the area.

The accident happened in the afternoon and promptly enough after receiving the telephone call in the afternoon the adjuster went to the scene of the accident. There he saw marks on the surface of the highway; he saw damage to a bridge railing; he saw the location of the vehicles after the accident; he talked to the traffic officer and to others, including the driver of the tractor-trailer unit. There were vehicles following the tractor-trailer unit and likewise vehicles following the passenger vehicle. He talked to the people who witnessed the collision. All these emphasized to him that it was clearly the fault of the passenger vehicle driver and that the tractor-trailer unit was completely on its side of the highway; as a matter of fact, partly on the shoulder when the collision occurred, and that the passenger vehicle rammed the left rear side of the tractor-trailer unit. The physical facts substantiated the oral statements of the witnesses; only two or three small snapshots were taken of the roadway and only one of the tractor-trailer unit, and that one was not clear. With that the adjuster folded his briefcase and returned to his office, reported that it was clearly a case of no liability, and there the matter stayed until shortly before the statute of limitations ran.

Suit was filed for well over $100,000.00, seeking to recover for the two deaths and the personal injury case. At the time we

received the file it was approximately a year from the date the accident occurred; witnesses had scattered; there were no written statements and no addresses; the only information we could obtain was a relatively meagre description of the vehicles and, by long, arduous efforts, we were finally able to locate two of the occupants of the vehicles following the tractor-trailer unit, but their memories had faded, and their value as factual witnesses, with no written statements to refresh their memories, was greatly diminished. We visited the scene of the accident with them and were able in some degree to re-construct in their minds what they had seen on the day of the occurrence.

We went into the trial of the case with a very competent array of legal counsel representing the plaintiffs. The court was in the attitude of overruling all motions for peremptory instructions. When the case was finally settled it was for an amount far in excess of the cost of the litigation, because the trial counsel was not equipped with the whole armor of truth.

I give you this example to emphasize that the entire cost of the investigation and the preservation of the facts in the form of written statements, commercial photographs, engineer's survey and location of the gouged-out marks and skid marks on the highway would have been a mere pittance compared to the final payment that was made in this case, so that one of the first things I would suggest to the claim departments after the file is classified as to its category with reference to liability and its category with reference to personal injuries or death, is that in those cases classified as questionable liability or non-liability, having serious injuries or death, the adjuster be authorized to confer with the trial counsel and be authorized to incur expenses necessary to the preservation of the facts as he finds them. In some instances the expenditure will be nominal; in some instances more, but one of the most effective ways is in the form of pictures revealing skid marks, pictures of the vehicles, signs on the highway and an engineer's survey locating the marks, grades, curves, road signs and culverts at the scene.

In this day of changing times, and particularly in the highway building in various localities, national and state road beds are reconstructed, relocated, resurfaced and rebuilt, with the result that the grades, curves and other physical features that have a definite bearing on the defense of the lawsuit have completely disappeared by the time the actual preparation for trial arrives. What may appear to the adjuster to be an insignificant and wholly unimportant object on or along the highway may, in the presentation of the defense, be one of the most important physical factors in determining liability.

In emphasizing the importance of the procurement and the preservation of physical evidence, an accident involving three passenger vehicles occurred near Knoxville, Tennessee, on one of the interstate highways. There were two serious personal injuries involved and quite extensive property damage. From the physical facts as they appeared to the adjuster, who went immediately to the scene, accompanied by the insured who, fortunately, was not injured, it was obvious that certain commercial signs, as well as road signs and roadway markings, would be material. It also appeared from his preliminary investigation that this file would develop into one of those non-liability major bodily injury cases. After a conference the following day with the trial counsel the claim department authorized the adjuster to take court reporter statements from all available witnesses, to employ a commercial photographer to take pictures of the scene of the accident at the angles suggested by the trial counsel. He was further authorized to have a civil engineer make a survey of the segment of the highway, extending a distance of about 1,500 feet, taking the grades, width of the shoulders, width of the pavement surface, midline markings, commercial signs, telegraph poles and any other physical objects then located along the highway.

As was anticipated by the claim department, the adjuster, and the trial counsel, litigation would and did develop. Before the time for actual preparation for the trial, the shoulders of the roadbed had been widened, certain commercial signs along the highway had been taken down, the ditch line along the highway had been located further away from the paved surface, and a new road sign establishing a speed limit, had been erected after the accident had occurred, and a commercial sign along the highway became very ma-

terial to the preparation of our case for defense. The result of this investigation and preservation of the facts, authorized by the claim department and procured by the adjuster under the direction of the trial counsel, was the prime reason for the plaintiff's demand dropping from an original $17,500.00 to a settlement figure of $500.00, which was actually less than the cost of trying the case. The expenditure authorized in this case was slightly more than nominal, but the importance of having the facts benefitted the company a hundred-fold.

The claim department can help the trial attorney combat NACCA by authorizing and instructing its adjusters, on those files that we have classified as in that zone of non-liability or questional liability, major bodily injury or possible major bodily injury, to confer more often with the trial counsel, with the idea that the facts may be garnered and preserved until such time as the defense counsel is required to gird himself with the facts in defending a non-liability case.

There are no more important pieces of evidence to be brought before a jury than photographs. However, ordinary pictures of the scene of an accident and of the damaged vehicles sometimes can be of little or no value and sometimes can be downright misleading as to what the true facts were at the time the accident occurred. For that reason photographs should, at times when possible, be made under the direction of the trial counsel, as to the angle, the location of the camera, etc. The picture of the roadbed, in some instances showing skid marks or gouged out marks on the pavement, should always be tied in with some permanent object along the side of the road and tied in also with the midline dividing the lanes of traffic, and other objects that will help establish the definite location of the marks. Many times the point of contact between the two vehicles is of major importance in determining where liability lies, so that the pictures of the vehicles, as well as the pictures of the highway, must be taken with a definite objective and a definite purpose in mind.

It is quite disappointing for the trial counsel to review a file and to find that the adjuster, with all good intentions, had apparently taken the pictures promiscuously, and in some instances, left out the most important picture or the most important angle of the shot that could have been taken. It is important likewise to take pains in taking the pictures where there is no commercial photographer available immediately and the adjuster must resort to the well known "Brownie" snapshots, because these "Brownie" shots that are taken immediately after the accident and before it gets "cold" must often times be enlarged for the trial, and if care is not taken most of the detail is lost.

On the subject of pictures, it is impossible to take a picture so as to give a true relative position of all objects that appear on the print. However, by getting shots above the road, from a high bank or on top of a car, the relative positions of the marks and the center line many times will definitely appear. Many distortions in the relative positions of the objects that appear in the photograph are corrected by the introduction of the map or survey made by a civil engineer. If there are any curves involved, the degree of the curve is correctly shown on the map, and what might appear to be a sharp curve in a photograph could very well be a mild curve; what might appear to be a steep grade in a photograph could very well actually be a very mild grade, so that photographs and engineer's plats can easily be tied together by the trial counsel and, to use the phrase used in our office, "nail the geography down".

Before leaving the subject of photographs, the adjuster must always be alert to leads that will enable him to find the truth, such as immediately checking the daily newspapers in the vicinity where the accident occurred. Not infrequently the weekly papers in the rural areas have important leads to witnesses and other factual data.

As an example of the importance of this, a case came to our office that occurred on a leading highway near Knoxville. In the file were pictures taken of the two vehicles, before they were moved by the wrecker, and while they had the traffic blocked along the highway. In those pictures appeared the highway troopers and two people who actually saw the collision. This suit was filed in the state courts in Tennessee, in which we had no discovery procedure. Plaintiffs counsel, who is recognized as one of the outstanding plaintiff's counsel in Knoxville, accepted his

client's statement and witnesses, to the effect that the collision occurred on the plaintiff's side of the road, and that the defendant's car had pulled out from behind a tractor-trailer truck directly into the face of the plaintiff's car, resulting in extremely serious personal injuries to the plaintiff and his family.

The pictures were enlarged at the request of counsel and, after witnesses for the plaintiff and the plaintiffs themselves had testified with reference to the location on the center line where the collision occurred, the pictures were produced at the close of the defendant's testimony. The result of the introduction of these pictures, showing the location of the cars definitely on the defendant's side of the road, as a matter of fact, one of his wheels was on the shoulder, (almost a complete head-on,) was devastating to the plaintiff. The demand dropped from $27,500.00 down to $7,500.00. The jury, after deliberating three hours, came in with an aggregate verdict for all of plaintiff's injuries to his family and himself of $6,-500.00. Motion for a new trial was filed and the trial judge took the motion under advisement but, before he acted upon it, the cases were all settled at what might be termed a nominal figure. The adjuster who handled this case was experienced and resourceful. He learned that someone was near the scene of the accident taking pictures and, following the process of elimination, finally located the photographer. The adjuster, in addition to using his imagination and his ingenuity, must also have a determination to exhaust all avenues to reach and preserve the facts.

The taking of written statements is undoubtedly one of the most important methods of preserving the truth. There are several different forms and methods of taking these statements. They serve two primary purposes insofar as the trial attorney is concerned in reviewing his file and preparation for trial. The first one is to refresh the memory of an honest witness. The lapse of time from the date of the accident to the actual presentation of the case in court in all cases is at least several months and in certain localities many years, so that the honest witness, when he reviews his statement, in whatever form it may be in, is anxious to review it, thereby refreshing his memory as to what the truth actually is. Secondly, the written statement acts as a deterrent to the witness who has changed his attitude from that of a disinterested witness to a hostile witness, thus making him much more hesitant to come into court and make a statement contrary to the written, signed statement.

The form of statement and its completeness is of prime importance. When the adjuster visits the witness his statement, in whatever form it may be, either court reporter, typewritten, or longhand, should, like the photographs, be taken with a definite purpose in mind. It should be all-inclusive insofar as details are concerned. Estimates of measurements, or actual measurements if the witness has made them, speed of the vehicles, skid marks, distances, time of day, condition of the weather and the position of the witness are some of the main points to be covered and, like the photographs and the highway survey, what may appear to be insignificant may turn out to be of major importance in the defense of the case.

The form of the statement that I prefer is a court reporter statement and, if it is of sufficient importance to take a court reporter's statement, then it should be signed by the individual and sworn to after the court reporter transcribes the statement. Care should always be taken by the adjuster to leave the name of the insurance company, or any insurance company, or just the word insurance, completely out of any conversation, and his introduction should be as a representative of the person who was driving the vehicle. When distances, or estimates of distances, are incorporated in the written statement they should be distances actually measured by the witness or estimated by the witness.

After all of the initial investigation has been made, photographs and statements of obvious witnesses, etc., are all obtained, there frequently develops in the investigation a witness whose name is never obtained. As for example, in a case that was in our office, an Air Force Officer was accompanying the body of a service man to a town in the State of Kentucky when a passenger on a common carrier pretended he was injured by falling over baggage that was allowed to get into the aisle. The only information we had was as I have stated. By perseverance, this Air Force Officer was located at one of the air bases and was finally contacted and a detailed

written statement taken from him. When the case came on for trial this witness was the difference between winning and losing the lawsuit for the defendant.

It is impossible to point out a complete set of rules that will fit every case to be investigated. However, by accepting the challenge, it is a recognized fact that in the insurance industry, in its claim departments and company field adjusters and their trial counsel, with the proper cooperation between all phases of claim handling, the challenge will develop in each of us an inspiration to do a more complete and thorough job.

In summarizing, let me say that the adjuster to whom the ball is first pitched must exercise his imagination, his ingenuity, his resourcefulness and his perseverance in gathering into his file and preserving for the trial counsel such facts. These may be in the form of pictures taken with a purpose in mind, with a survey, if the roadways or intersections involved are likely to be changed, statements of witnesses, police reports, and other documentary evidence, all procured with a purpose in mind, all activities of the adjuster motivated by the desire to bring to light and preserve the truth.

The heads of the claim departments, or the examiners, should give to their adjusters in the field authority to confer with trial counsel and receive suggestions with reference to obtaining and preserving the truth that is material to the defense of future litigation. They should also be authorized, in files warranting the expenditure, to spend the money necessary to obtain pictures taken by individuals who were at the scene of the accident, all of course within the bounds of reason, with a careful, capable examination of the file in the home office. They can likewise urge the field adjuster to be diligent and to waste no time in getting the facts while they are fresh, in such form as they will be preserved and in such form as the seriousness of the case warrants.

No trial attorney who has in his possession full and complete facts out of which litigation arises has any fear of NACCA and, in the preparation for trial and the presentation of the defense in the courtroom, the trial attorney likewise must be imaginative, resourceful, ingenious, untiring and persevering. He must recognize that if he fails in his job all of the work, supervision and guidance of the claim department is uselessly wasted.

There is no substitute for experience, and experience combined with ability is the ultimate that should be demanded by the heads of claim departments throughout the entire course of claim handling.

Insurance of Warehousing and Other Bailment Risks*

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THE HANDLING of goods, wares, and merchandise by warehousemen and other bailees dates back into antiquity and has flourished as long as there have been trade and commerce between peoples and nations. One of the early records of food warehousing is found in Genesis,[1] where it is recorded that during the seven lean years which followed the seven years of plenty Joseph "opened the storehouses" and sold grain to the Egyptians. In recent years the vast expansion and complexity of trade and commerce have required the development of many and varied classifications of public warehousing. One type is generally referred to as the commodity warehouse, which serves the specialized needs of the various industries in storage of cotton, tobacco, grain, potatoes, and other commodities and produce. Another class serves industry as a place of storage of raw materials, equipment and parts, or finished manufactured goods of literally hundreds of different varieties. Some warehousemen specialize in storage of bulk liquids such as chemicals and oils, syrups, medicines, etc. Others provide refrigeration or cold storage for produce, food, or any other product which requires controlled humidity or temperature for preservation. One specialized field is storage of household goods, which perhaps provides as many controversial questions as any other type of warehousing. Bonded customs warehouses play an important part in the importation of goods from foreign countries. Another of the types of so-called bonded warehouses is the United States Internal Revenue warehouse which provides for the storage of distilled spirits and is a highly specialized undertaking carefully supervised by the federal government.

In 1916 Congress enacted the United States Warehouse Act[2] which relates to the warehousing of agricultural products, including grain, tobacco, cotton, wool, fruit, etc. Licensing under this act is not compulsory; however, one of the principal purposes is to provide a system of inspection, regulation, and standards to facilitate the financing and sale of such commodities.

The present-day volume and value of the vast quantities of personal property which are in the care, custody, and control of bailees runs into such astronomical figures that it is difficult even to hazard a guess as to the total. An indication of the magnitude of one segment of this type of business is to be found in the 1954 Census of Business,[3] which reveals that at the close of 1954 there were 7,565 public warehouses of various classifications in the United States. The approximate aggregate revenues derived by these warehouses from storage of goods ran to some $757,000,000. According to a recent survey, there are some 3,200 household goods warehouses where government property of the estimated value of $18,000,000,000 was either in storage or subject to storage.

Equally impressive is the volume and value of personal property which is handled daily by other types of professional bailees, such as laundries, cleaners, fabricators, processors, patternmakers, dyers, manufacturers, furriers, contractors, builders, repairmen, and checkrooms. The foregoing is in no sense an all-inclusive list; of course a great volume of goods, wares, and merchandise is handled by another class of bailees—contract and common carriers.

This vast, variegated, and complex aspect of commerce and industry provides a fertile field for the insurance industry. For example, inland marine insurance

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[1]Genesis 41:48, 56.

[2]39 Stat. 486 (1916), 7 U.S.C. §§ 241-73 (1952).

[3]United States Department of Commerce, 1954 Census of Business xi-7.

has expanded its premium volume from approximately $50,000,000 in 1940 to some $400,000,000 in 1957. This classification is concerned chiefly with insurance of liability and property either in transit or subject to transportation, or in the possession of bailees at one time or another. Broad programs of insurance have been developed not only for owners but also for bailees interested in covering their liability and interest as well as the interest of their bailors.

In order better to understand and appraise the various and multiple forms of insurance coverage afforded for both bailees and bailors, some working knowledge of the basic legal premises which underlie the respective rights, liabilities, and obligations of bailors and bailees is required. It is, of course, not feasible to review here more than a few of the legal considerations involved nor to attempt to discuss all of the insurance forms, coverages, and problems pertaining thereto. What we can do here is to refer to certain of the problems and principles in the hope that such may serve as a guide for further study and research.

LIABILITY OF BAILEE FOR DUE CARE

When property is delivered by or on behalf of a bailor to a bailee, the latter becomes obligated upon assumption of custody, even without further or specific agreement, to exercise reasonable care with respect to the property while it is in his possession and to return the property upon demand of the bailor when the purpose of the bailment has been fulfilled.[4] Even though the parties may not have yet reached a specific agreement as to the terms and conditions of the bailment, the bailee, upon assumption of custody, becomes liable by operation of law for the exercise of due care, which is that of the reasonably prudent owner of such property under like and similar circumstances.[5] Section 21 of the Uniform Warehouse Receipts Act, which is held to be but a codification of the common-law rule,[6] supplies a clear, understandable definition of the obligation of a warehouseman, and this rule is equally applicable to all other bailees.

> "Liability for any loss or injury. § 21. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."[7]

Attention is directed to one qualifying phrase in the foregoing definition, "in the absense of an agreement to the contrary."[8] The terms and conditions of any bailment are subject to the agreement of parties and except for violation of tenets of public policy or statutory prohibitions, the parties may agree to any terms so long as they are in a parity of position and there is a meeting of minds.[9]

As will be noted below, the problem is often complicated by difficulty in determining the intent and terms and conditions of the agreement between the parties. An example, which unfortunately is all too common and which obviously af-

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[4] 6 Am. Jur., *Bailments* § 4 (rev. 1950).

[5] The particular standard of care and diligence imposed by law on a bailee in caring for the property entrusted to him, and the liability for the loss or damage thereto, generally depends on the nature of the bailment. 8 C.J.S., *Bailments* § 26 (1938).

[6] *H. J. Keith Co. v. Booth Fisheries Co.*, 27 Del. (4 Boyce) 218, 87 Atl. 715 (1913) (referring to Illinois statute); *Levine v. D. Wolff & Co.*, 78 N.J.L. 306, 73 Atl. 73 (1909); *Mortimer v. Otto*, 206 N.Y. 89, 99 N.E. 189 (1912); *Buffalo Grain Co. v. Sowerby*, 195 N.Y. 355, 88 N.E. 569 (1909); Uniform Warehouse Receipts Act § 21.

[7] Ill. Rev. Stat. c. 114, § 253 (1957).

[8] ". . . [U]nless . . . his liability is enlarged or diminished by special agreement, an ordinary bailee is not an insurer of the subject of the bailment and is only liable for the negligent loss or damage to the property." 8 C.J.S., *Bailments* § 26 (1938).

". . . [I]ncreasing support is found among the authorities for the assertion, as a general principle, that the bailee is bound to, and his culpability arises for anything less than, that degree of diligence which the manner and the nature of his employment, in the light of all the circumstances, make it reasonable to expect of him." 6 Am. Jur., *Bailments* § 240 (rev. 1950).

[9] ". . . Factors which have been deemed of controlling importance by some authorities are the relative positions of the parties in respect of bargaining power, and the extent to which the public interest may be involved. Distinctions have been based upon the nature or class of the bailment as ordinary or casual, or as one made in the course of a general dealing with the public." 6 Am. Jur., *Bailments* § 176 (rev. 1950).

fects the liability of the parties and their respective insurers, is found in the case of a manufacturing company owning valuable patterns which are delivered to a subcontracting foundry or fabricator to enable the latter to process or fabricate certain parts or a complete manufactured product. The invoice or work order of the manufacturer may contain printed terms and conditions providing that the patterns are to be held at the risk of the subcontractor and in some instances that the latter will keep the same insured. The complementary document, contract, or work order issued by the subcontractor in lieu of a receipt for the patterns may contain reference to the services to be performed and also standard printed terms and conditions which conflict with those of the manufacturer's invoice. When loss occurs through some casualty, all of these conflicting provisions, coupled with any other agreements in writing which may tend to indicate a mutual intention, and/or the conduct of the parties and other available and pertinent evidence, must be considered in attempting to determine the parties' respective rights and obligations.

An illustrative case involved a foundry fire which destroyed parts and patterns of others valued at a million dollars. The foundry carried no insurance to cover this specific property, and its liability insurance covering values in its care and custody was grossly inadequate. The owner of certain of the valuable patterns destroyed carried its own insurance and collected for the loss. The insurer, as subrogee of its insured, filed suit against the foundry in an attempt to collect the loss. The theory of the action was not that the foundry was negligent with respect to the fire, but that the terms of the order issued by the owner to the foundry provided in effect that the foundry would be responsible for loss or damage by fire or otherwise to the patterns and would return the same upon demand. The foundry's receipt provided that it accepted no responsibility for loss from any cause unless such terms and conditions were specifically agreed to in writing by an officer of the company. However, an examination of the many manufacturer's invoices, whose terms placed the responsibility on the subcontractor, indicated that many had been signed by the factory manager of the foundry, who also happened to be an assistant secretary of the corporation. This suit was compromised and settled before the trial, although the facts provided a fertile basis for litigation. Agreement on these pertinent points is of vital importance to the parties and their insurers, and the respective responsibilities and liabilities should not be left in doubt.

RESTRICTION OF BAILEE'S LIABILITY

As has been heretofore mentioned, one of the commonly accepted means by which the bailee may restrict his liability is through the terms and conditions of work orders and receipts which pass between the parties at the time the property is delivered to the bailee.[10]

The Court of Appeals for the Seventh Circuit recently affirmed the judgment in the trial court wherein a defendant was held not guilty for damage to a locomotive crane which suffered extensive damage while being operated by the defendant upon its own premises or that of one of its subsidiaries.[11] In that case, the work order contained a condition which was intended to limit liability of the defendant steel company and any of its subsidiary corporations from responsibility for loss and damage caused by its own negligence. Such condition was held enforceable.[12]

[10]As said in *Corpus Juris Secundum*: "The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement." 8 C.J.S., *Bailments* § 22 (1938).

[11]*Insurance Co. v. Elgin, J. & E. Ry. Co.*, 229 F. 2d 705 (7 Cir., 1956).

[12]"By its purchase order the Steel Company expressly and clearly provided under Condition 4 that: 'Seller [Gray & Company] agrees to carry insurance in an insurance company satisfactory to Purchaser [the Steel Company] insuring seller's liability to pay and the liability of Purchaser, if any, to pay . . . for all damages to property in any manner caused by, arising from, incident to, connected with or growing out of the performance of the work covered by this purchase, in amounts not less than $50,000. . . . The obligation to carry this insurance shall not limit in any way the liability assumed by Seller specified elsewhere in this purchase'.

"In Condition 7 of this purchase order it was provided that: 'Seller agrees to bear all loss and

Limited-liability or valuation-device conditions are commonly employed in various classes of bailments. Common examples are checkroom and laundry receipts, and fur garment storage receipts, where it is not at all unusual that a $5,000 mink coat will be valued for the purposes of bailment at not to exceed the sum of $100. Another is found in certain warehouse receipts, particularly with respect to storage of household goods. In such receipts it is usually the rule rather than the exception that the receipt will contain a provision limiting the responsibility of the warehouseman, in consideration of the rate of storage, to $50 per package or container and contents thereof, or to some weight basis such as ten to thirty cents per pound. The courts have not looked with favor upon such attempts to limit the liability of bailees for losses arising through negligence; nevertheless, the present trend of the majority of judicial decisions is that such agreements will be upheld if it can be shown that there has been a meeting of minds on the specific terms of the limited valuation or liability agreement. An excellent exposition of the basic theory underlying the validity of such an agreement was made in 1884 by the United States Supreme Court with respect to similar agreements between shippers and carriers. The court in *Hart v. Pennsylvania R. R. Co.* said:[13]

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that since a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. . . ."[14]

Courts throughout the United States have, with few exceptions, upheld the limited valuation rule. The courts of Illinois appear likewise to follow the majority rule in upholding limited valuations as well as restricted liability agreements, between lessor and lessee as well as bailor and bailee.[15] The Illinois rule in a bailment case is well illustrated by the decision in *Schoen v. Wallace.*[16] In this case, plaintiff delivered her fur coat to the defendant and received a receipt wherein the garment was stipulated to be of the value of $100. The receipt also provided that the defendant did not have any liability in excess of the stipulated valuation for any cause whatever, including the negligence of the furrier. The court upheld the provision on the grounds that it was not in violation of public policy, and that there had been an agreement and meeting of minds between the parties with respect to the terms and conditions of the bailment. The court said:

> "The basic question presented for determination is the validity of the agreement between the parties limiting defendant bailee's liability to $100. . . .
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> ". . . In *Jacobs v. Grossman,* 310 Ill. 247, 250, the court said: 'Whatever may be the rights of the parties in a bailment for the mutual benefit of bailor and the bailee, it is unquestionably the law that the parties may increase or diminish these rights by stipulations contained in the contract of bailment.' To the same effect is *Krupp v. National*

[13]112 U.S. 331, 5 S. Ct. 151 (1884).

damage to . . . equipment . . . not owned by Purchaser which [is] used or [is] to be used by Seller in the prosecution of the work covered by this purchase, however [sic] such loss or damage may be caused or occasioned, whether by fire or otherwise and to indemnify and save Purchaser harmless from and against all liability for such loss and damage.'" *Id.* at 707-08.

[14]*Id.* at 340-41, 5 S. Ct. at 156.

[15]The Illinois Supreme Court has taken the position of upholding the exculpatory clauses of leases which would relieve the lessor from liability for damages even if they were caused by his own negligent acts. The court refused to hold, as a matter of law, that there was such a disparity of bargaining power that the lessee did not have a freedom of choice. *Jackson v. First Nat'l Bank,* 415 Ill. 453, 114 N.E. 2d 721 (1953).

[16]334 Ill. App. 294, 78 N.E. 2d 801 (1st Dist. 1948). See also *Blinder v. United States Fire Ins. Co.,* 103 F. Supp. 902 (N.D. Ill. 1952), and collected authorities on this subject in Annot., 175 A.L.R. 8 (1948).

Fur Dressing & Dyeing Co., 250 Ill. App. 282, and *Shayne v. Krebs*, 55 Ill. App. 238."[17]

As previously noted, the foregoing rule, limiting the bailee's liability, is also to be found in the decisions pertaining to somewhat similar conditions contained in warehouse receipts, particularly in warehousing of household goods. Although the forms of household goods warehouse receipts, widely employed throughout the United States, contain language which is either identical or quite similar to the form employed in Illinois, it is sometimes overlooked that the Illinois form has been prescribed by the Illinois Commerce Commission.[18] For many years amended rule 7 of General Order No. 139 of the Commission prescribed the required form. Condition 7 of this warehouse receipt provides:

> "The above named Depositor declares that the value of any article, piece or package including the contents received for the account of the same depositor, does not exceed the sum of $50.00, upon which valuation the rate is based, and the liability for any causes which would make it liable in case of loss or damage, while goods are in its possession, shall not exceed the sum so declared unless the owner or representative fixes a greater value, and agrees to pay an additional charge of twenty-five cents per $100.00 per month thereon."

Such limited valuation conditions in warehouse receipts are now generally held to be enforceable where there has been a meeting of minds of the parties, but the courts are not easily satisfied that this requirement has been met. The reported decisions reveal that many such purported agreements have not been upheld, usually because the courts have taken the position that there could be no meeting of minds unless the particular provision was in some manner brought to the specific attention of the bailor. There are, of course, cases where the action and conduct of parties should estop the depositor from asserting that he was unaware of the conditions of the contract.[19]

It is pertinent to observe, however, that there is one important exception to the validity or enforcibility of such limited valuation agreements. Such conditions will not be enforced where the bailee or warehouseman stored the property in a place other than as agreed, where he has been guilty of some act tantamount to conversion in delivering the property into the possession of a third party contrary to the knowledge or consent of the owner, or where the warehouseman or bailee is guilty of affirmative wrong-doing or misfeasance.[20] These cases also include situations in which the warehouseman has failed to follow the statutory provisions with respect to the sale of property to satisfy a lien.[21]

From the foregoing, it is obvious that the rights of the bailor may be substan-

[17]334 Ill. App. at 296-97, 78 N.E. 2d at 802.

[18]The General Orders of the Commission are authorized and defined by the Illinois statute entitled "Storing Personal Property for Hire." Ill. Rev. Stat. c. 111 2/3, §§ 119-39 (1957). Further comment on these regulations will be found later in this article.

The latest General Order of the Commission on this subject appears to be Number 166. Although I am informed that some further hearings are contemplated by the Commission, a new form of Liability Insurance Policy and Household Goods Warehouse Receipt is in the process of being prescribed. However, it is doubted that any substantial change is contemplated with respect to the released valuation of the property.

[19]Representative cases in other states where these provisions have been widely considered by the courts include cases such as *Brasch v. Sloan's Moving & Storage Co.*, 237 Mo. App. 597, 176 S.W. 2d 58 (1943); *Voyt v. Bekins Moving & Storage Co.*, 169 Ore. 30, 119 P. 2d 586 (1941), *opinion adhered to on rehearing*, 127 P. 2d 360 (1942).

[20]In *Dolphin v. Davis*, 183 Ill. App. 118 (1st Dist. 1913), the court said: "If a person who is intrusted with the goods of another for a particular purpose put them into the hands of a third person, contrary to orders, it is a conversion. A wrongful intent is not necessary. It is enough that the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it." *Id.* at 120.

The court held that under such circumstances the bailee was liable for damage to the property without regard to whether the bailee or second bailee to whom he delivered the goods had been negligent. Authorities cited as contra to *Dolphin v. Davis* are illustrated by such cases as *Travelers Fire Ins. Co. v. Brock & Co.*, 47 Cal. App. 2d 387, 118 P. 2d 25 (1941), where the court held that delivery of property to a second bailee for specialized repair work did not of itself constitute a breach of the bailment agreement and the bailee was not liable where care was exercised in selection of a repairman and the latter was not negligent.

[21]*Page v. Allison*, 173 Okla. 205, 47 P. 2d 134 (1935). To the same effect see *Arizona Storage & Distributing Co. v. Rynning*, 37 Ariz. 232, 293 Pac. 16 (1930). For a review of cases where bailee stores or keeps goods in a place otherwise than as agreed, see collected cases in annot., 12 A.L.R. 1322 (1921).

tially restricted to something less than the obligation which the bailee would have had but for the agreement between the parties.

EXTENSION OF BAILEE'S LIABILITY

On the other hand, the bailee may, perhaps even more easily, enlarge his responsibility over that imposed by the common law, and be held to a much higher degree of responsibility for loss caused by his negligence. It is obvious that such extension of responsibility is vitally important to both bailor and bailee in the formulation of their respective insurance programs.

As has been indicated, the terms and conditions of such documents as work orders and receipts provide a medium whereby the parties may agree on their rights and responsibilities. The provisions of such agreements may well extend or enlarge the obligations of the bailee. For example, the bailee may agree to be absolutely responsible for loss and damage to goods while in his possession, and whether he is negligent or not, or whether the loss and damage may have been occasioned by an act of God is of no moment. Jewelry, furs, and other merchandise are often delivered to bailees or under a consignment agreement which imposes upon the consignee-bailee such responsibility for loss from any cause.[22]

[22]A succinct statement of the rule is found in the case of *Sun Printing and Publishing Ass'n v. Moore*, 183 U.S. 642, 22 S. Ct. 240 (1902), where Chief Justice White, speaking for the Supreme Court, said:

"It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. . .

"But it is equally true that where by a contract of bailment the hirer has either expressly or by fair implication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling and must be enforced according to its terms." *Id.* at 654, 22 S. Ct. at 245.

In *Steele v. Buck*, 61 Ill. 343 (1871), the obligation of the bailee was that "the lessee would deliver the vessel at the port of Chicago at the close of the navigation season for the year in as good and sound condition as she then was, reasonable use and wear excepted." The vessel was destroyed upon the lake and in holding that there was a breach by the failure to deliver, the court said:

". . . It is absolute in its terms. It is a positive undertaking by Vogell and Crandall to restore the propellor at the end of the season for which it was hired, notwithstanding it might be destroyed by the perils of the sea." *Id.* at 348.

In the later Illinois case of *Standard Brewery v. Bemis & Curtis Malting Co.*, 171 Ill. 602, 49 N.E. 507 (1898), the court distinguished an agreement "to deliver" certain malt from the obligation of the bailee as agreed in the case of *Steele v. Buck, supra*, and said:

". . . Certainly the contract here under consideration bears no such construction as that placed on the bond there sued on. The obligation of the bailee to redeliver the malted grain to the bailor arose by implication of law, and without any express agreement whatever the bailee would have been under the same obligation to make such delivery that it is under the contract, except, perhaps, as to the place of delivery." *Id.* at 608, 49 N.E. at 509.

There is, however, some division of authority on the question of whether an agreement by the bailee to return property in as good condition as when delivered at the job site, usual and ordinary wear and tear excepted, imposes an absolute liability on the bailee for safe return of a machine. In the late case of *Seaboard Machinery Corp. v. Fireman's Fund Ins. Co.*, 156 F. Supp. 40 (N.D. Fla. 1957), the court said:

"Counsel for intervenor-plaintiff conceded on oral argument and on brief in this case that under the general rule the common-law obligation of a bailee is to use due care and is liable to the bailor for damage to or loss of the property only in case of its failure so to do. In this case, however, intervenor-plaintiff vigorously insists that the contract here in question imposed absolute liability for the safe return of the property in question, and upon failure to make such return, bailee became liable to the bailor for the full replacement cost, or at least the full market value of the property.

"In making this contention, counsel for intervenor-plaintiff relies upon 6 Am. Jur., Sec. 239 and cases there cited. There are cases to be found in other jurisdictions supporting the position of intervenor-plaintiff herein, but in the opinion of this Court this case is controlled by the opinion of the Court of Appeals, Fifth Circuit, in *Reconstruction Finance Corporation v. Peterson Brothers* (*Peterson Brothers v. Arthur G. McKee & Company*) 160 F. 2d 124, and by the decisions of the Supreme Court of Florida in the following cases: *Williamson v. Phillipoff*, 66 Fla. 549, 64 So. 269, 52 L.R.A., N.S., 412; *Coombs v. Rice*, 64 Fla. 202, 59 So. 958. Many other cases from other jurisdictions could be cited, but as Judge Hutcheson said in *Reconstruction Finance Corporation v. Peterson Brothers, supra* (160 F. 2d at page 126):

'A great deal has been written on the subject of the enlargement by special contract of the common law liability of a bailee, and there is a difference of opinion as to what form of words will suffice. It will serve no useful purpose to discuss the authorities here. It is sufficient to say that while some cases have held that the use of language such as that relied on by appellant will enlarge the common law liability of bailee, the great weight of authority is to the effect that such a clause merely sets expressly out what a common law bailment implies, and does not add anything to it.'" *Id.* at 42.

See also collected cases in annotation, 150 A.L.R. 269 (1944).

Agreements of this kind were involved in cases such as *M. Reiner and Bro., Inc. v. World Fire & Marine Ins. Co.*,[23] where the consignment agreement provided that the bailee should be "responsible for loss or damage by fire, burglary or otherwise until goods are returned or paid for." In the Illinois case of *H. J. Krupp v. National Fur Dressing & Dyeing Co.*,[24] it was held that the bailee's obligation was increased by the consignor's memorandum agreement, which stated: "The goods are at your risk for loss by fire or theft."

One of the obligations commonly assumed by a bailee over and beyond that imposed by the common-law obligation is an agreement to insure the property of the bailor. He will, of course, be held responsible for breach of such a promise or agreement to insure or to procure insurance. In the case of *Schoenfeld v. Fleisher*,[25] there was a promise on the part of the factor to insure the goods. The court said:

> ". . . . [I]f, in any of the cases mentioned [including a promise to insure], the agent neglect to make the insurance, he is himself, by the custom of merchants, to be considered as the insurer, and liable as such in the event of loss. . . ."[26]

The majority rule is that if the bailee fails to insure, he is liable in the event of a loss to the same extent as he would have been had he effected the insurance and received the proceeds of the policy.[27] Likewise, one under duty to insure by reason of his agreement is presumably required to insure for full value. An excellent illustration of the rule is to be noted in *Broussard v. South Texas Rice Co.*,[28] where the court said that one engaged in the business of milling rice who charged two cents per sack for insurance was under a duty to insure the rice to its full value, and where he did not do so, and a loss occurred, he was liable for the resulting damages although he procured insurance to the amount which the two cents would purchase.

The case of *H. J. Krupp v. National Fur Dressing & Dyeing Co.*,[29] previously cited to show that the consignor's memorandum put the risk of loss for fire and theft on the defendant, is of further interest because the bailee's receipt to the consignor contained an agreement by the bailee that, "the undersigned (the bailee) will keep insured to full value against loss or damage by fire, burglary, hold-up or robbery according to the standard form of policy, for the benefit of the owner, the merchandise hereby delivered until returned to the owner."

The bailee was held bound by such undertaking. In this connection, it might be well to direct attention to an Illinois statute of which many bailees are ignorant and which consequently is in many instances not observed. We refer to "An act relating to insurance on property which is the subject of a bailment contract":

> "If a bailee for hire makes a separate charge for any part or all of the cost [of] any insurance which he may carry to indemnify him against liability for loss or damage of property of a bailor while in the possession or control of the bailee, or if a bailee for hire in any manner informs a bailor or prospective bailor that his property will be protected from loss or damage while in the bailee's possession or control and makes a charge for such protection, then the bailee shall furnish to the bailor, at the time the bailment contract is entered into, a statement plainly showing the type and extent of the coverage of such insurance, the particular articles of property insured against loss or damage, the maximum amounts recoverable, and the name of the insurance carrier. If the bailee is a self insurer, no separate charge for insurance shall be made. The requirements of this Act shall not apply to insurance procured by the bailee to protect against loss while the property is in transit by mail, express or other means of transportation.

[23] 53 N.Y.S. 2d 118 (1945).
[24] 250 Ill. App. 282 (1st Dist. 1928).
[25] 73 Ill. 404 (1874).
[26] *Ibid.*
[27] *Farney v. Hauser*, 109 Kan. 75, 198 Pac. 178 (1921); *Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S.W. 89 (1891). See also *Schroeder v. Mauzy*, 16 Cal. App. 443, 118 Pac. 459 (1911) (gratuitous bailee failed to insure a piano); *Reinstein v. Watts*, 84 Me. 139, 24 Atl. 719, (1891); *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923); *Pauksztis v. Raeder Blank Book Co.*, 212 Pa. 403, 61 Atl. 901 (1905); annotations, 16 A.L.R. 280, 293 (1922); 26 A.L.R. 1208 (1923).
[28] 103 Tex. 535, 131 S.W. 412 (1910).
[29] 250 Ill. App. 282 (1st Dist. 1928).

"No bailee for hire shall make a charge to the bailor for any part or all of the cost of such protection or insurance unless a statement as required by Section 1 [1092] hereof is furnished to the bailor.

"In case of loss or damage of a bailor's property while in such a bailee's possession or control and the bailee has represented to the bailor that he would be indemnified for loss in such cases, and no statement has been furnished to the bailor as required by Section 1 [1092] hereof, the bailee shall be liable to a penalty of $100, which penalty together with reasonable attorney's fees may be recovered by the bailor in a civil action."[30]

Where the bailee agrees to insure or where by statute he is required, as in certain states, to insure grain in storage, it is generally accepted that the bailee also has the obligation to collect the insurance proceeds in the event of loss and to pay the same to the owner of the property.[31]

[30]Ill. Rev. Stat. c. 73, §§ 1092-94 (1957).

[31]See *Nordal v. Davidson*, 50 N.D. 295, 195 N.W. 654 (1923). To similar effect, see *Dixey v. Federal Compress & Warehouse Co.*, 132 F. 2d 275 (8 Cir. 1942), where the court said: ". . . There was here a contract on the part of the defendant not only to insure, but there was a duty imposed on him by law which became a part of the contract, to collect the funds from the insurance company in the event of loss and promptly pay them over to plaintiffs." *Id.* at 278. See also *Johnston v. Charles Abresch Co.*, 123 Wis. 130, 101 N.W. 395 (1904). The bailee's policy covered stock which "consisted chiefly of carriages, . . . either its own or held by it in trust or on commission or in storage or for repairs or sold but not removed." Plaintiff delivered her buggy to the defendant bailee and it was destroyed in a fire. The bailee failed to file claim and collect from the insurer. The court allowed recovery and said: ". . . [P]laintiff was allowed to amend the complaint by alleging that, by the terms of the policies of insurance and of the notice given by plaintiff after the loss, plaintiff adopted and sanctioned the contracts of insurance, and defendant was from that time bound to take such steps as might be necessary to collect from the several insurance companies her loss; that defendant refused and neglected to make proofs of her loss, or to take any steps to collect the same; that by such failure, and by accepting the sum of $13,094 and releasing the policies, defendant deprived the plaintiff of her rights and interests in the policies of insurance and the money payable thereunder, which it might have collected for her; and that, by reason of such transactions, defendant became responsible to plaintiff for such an amount of money as the plaintiff should have received, under the contracts and proof of loss, by reason of the damage to the victoria, as part of the property covered by the policies". *Id* at 132-33, 101 N.W. at 396.

INSURANCE COVERAGES CARRIED BY BAILEES

The so-called professional bailees carry various types and forms of insurance coverage. This includes not only liability insurance but also direct insurance coverage on property of others in their custody. One example of the latter is a fire or inland marine policy, which extends coverage not only to the property used by the insured in his business, but also extends to property of others in his care, custody, or control or which he holds under the so-called "in trust or on commission" clauses, or the clause "or for which the insured may be liable." As has been noted, a bailee, in the absence of an agreement to the contrary, has no obligation to insure the goods of others in his possession; however, certain classes of bailees, primarily engaged in personal services, usually insure property of others in their possession not only because of the nature of their business but also for maintenance of good will. An example is the inland marine form of "Bailees' Customer Policy," which is carried by laundries and cleaners. This policy usually provides no coverage for the equipment of the laundry or dry cleaner, except perhaps in some cases the earned charges on damaged property. This form of coverage usually contains clauses providing for coverage "on all kinds of lawful goods and/or articles described herein, being the property of its customer while in the possession of the assured. . . ." Coverage is usually confined to defined locations and/or while in transit to and from the premises of the insured.[32] Another specialized and somewhat complex type of coverage carried by furriers is known as a "Furriers' Customers Policy" and is the most widely issued form for retail furriers. This policy covers only the furs and articles of fur, the property of others in the care, custody, and control of the furrier, and does not extend to property or stock belonging to the furrier. This coverage is subject to certain stringent conditions, which

[32]Cases involving this form of policy include *Automobile Ins. Co. v. Tri-City Locker Corp.*, 86 Ga. App. 352, 71 S.E. 2d 582 (1952), and *Camden Fire Ins. Ass'n v. Moore*, 206 S.W. 2d 104 (Tex. Civ. App. 1947), where the court held that under the peril of burglary, clothing which had been maliciously cut up and destroyed by burglars was covered as well as clothing actually stolen by the burglars.

include the issuance of a fur receipt to the customer wherein a valuation of the garment is set forth, and insurance coverage is limited to the valuation of the fur garment as shown in the receipt. This specialized coverage also may provide, for extra premium, what is known as an "Excess Legal Liability Endorsement." This insures the legal liability of the furrier for excess loss and damage, if any, over and above the amount of direct insurance provided under the basic policy. When loss or damage to a fur garment occurs in the possession of a furrier, for which the furrier is liable, an intricate legal question frequently develops as to the extent of the furrier's liability, which is presumed to have been restricted or limited by the agreement contained in the fur receipt.[33] It is to cover this specific exposure to which the furrier is subject that the legal liability endorsement is provided.[34] In general, the same basic questions are presented in such cases as have heretofore been noted in similar contractual restrictions found in warehouse receipts. The applicable legal premises are the same in both instances, except where specific statutory provision may provide an exception.

Other various types of coverage where the bailee may insure the property of others in his care, custody, and control include contractors' equipment floaters on material, tools, supplies, and equipment of others in his possession; installment floaters which involve contracts of sale of machinery and special equipment and which may or may not involve transportation; jewelers' block policies which provide broad coverage for jewelers' risks on their own property and, subject to certain conditions, insurance on property of others in their possession as well as the legal liability of the jewelers with respect to such property.[35] There are also the various types of fire and inland marine contracts covering property of others in the possession of fabricators and processors of literally dozens of types of property held temporarily by bailees, covering raw materials, patterns, piece work, unfinished and finished goods, etc.[36] The underwriting manual of one of the leading inland marine underwriters lists, in addition to some of the specific types and forms already mentioned, some 132 types of processing services performed by bailees on goods of others on which floater insurance may be procured to cover the

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[33]See cases cited note 16 *supra*.

[34]In *J. De Leo & Co. v. American Eagle Fire Ins. Co.*, 284 App. Div. 886, 134 N.Y.S. 2d 576 (1954), it was held that where coverage under a furriers' customers policy provided "the named assured issues a receipt which includes an agreement that the named assured shall effect insurance and contains the provisions required by Condition 1 of this Rider," and said Condition required that receipt disclose a valuation of fur garment, there was no coverage on customer's coat where no receipt was issued to customer in accordance with policy conditions.

Other cases involving the same policy include *Home Ins. Company v. Kirkevold*, 160 F. 2d 938 (9 Cir. 1947).

[35]For an example of controversy between insurers of bailor and bailee where the latter was insured under a jeweler's block policy, see *Marshall v. World Fire & Marine Ins. Co.*, 149 F. 2d 902 (9 Cir. 1945). This case involved loss by robbery of certain jewelry which plaintiff had delivered to the jeweler. The latter carried insurance which extended coverage for property of others under the clause "property as above described, delivered or entrustd to the assured belonging to others who are not dealers in such property or not otherwise engaged in the jewelry trade." The court found that when the jeweler received the property, he entered into agreements which extended his common-law liability in two respects: (1) he agreed with the owner that the property "was fully covered with insurance for said ring entrusted to his care," and (2) he would be "responsible for the safekeeping and return of said ring to plaintiff."

[36]Examples of controversies between insurers of bailors and bailees where bailee carries policy covering property of others held by it for processing, etc., see *Automobile Ins. Co. v. Springfield Dyeing Co.*, 109 F. 2d 533 (3 Cir. 1940). It is of considerable interest to note that within the last few years, most fire and inland marine insurers have subscribed to "Agreements of Guiding Principles" whereby controversies respecting overlapping insurance on the same property are resolved in accordance with certain rules. The purpose of such agreements was and is, among other things, to facilitate prompt payment of the insurance proceeds by one or the other of the insurers. Any such payments made by subscribers are without prejudice to the right of the interested insurers subsequently to adjust and arbitrate their differences in line with the agreed principles. It is, of course, pertinent to observe that such agreements are not intended to alter or impair the insured's rights under his policy. In *Spink v. Mercury Ins. Co.*, 260 S.W. 2d 757 (Mo. App. 1953), the St. Louis Court of Appeals said:

". . . It is obvious that the liability that the company agreed to assume was under an entirely different agreement and one to which the plaintiffs were not parties. Whatever the 'Agreement of Guilding Principles' may be, and it was not before the court, it could in no way affect the rights of the plaintiffs nor the insurer's obligation to them under its policy. It was another contract and if it is enforceable, the right to enforce it still rests with the defendants who were parties to it." *Id.* at 761.

property while in the care, custody, and control of the bailee. It may also be observed that under forms of inland marine insurance such floater coverage may be had by owners and bailors to cover while in the possession of bailees.

"IN TRUST AND ON COMMISSION"

As has been previously noted, some policies of insurance are frequently procured by bailees to cover only the property of their bailor customers, but generally bailees cover their own property as well. In development of the various forms of such coverage, certain language of the older forms has been retained. Thus, many policies continue to use language which contains the so-called "in trust and on commission" clauses. An excellent example is the standard form of fire insurance policy, the language of which is usually required to be uniform. The Illinois approved contents fire policy contains the following clause: ". . . and provided the Insured is liable therefor, personal property of others held in trust, or on commission or consignment, in storage or for repairs, sold but not delivered or removed." Some variation of this language is to be found in many of the different inland marine forms of coverage, as for example, in contractor's equipment floater forms principally covering property belonging to others: "This policy also covers materials, equipment, supplies, and temporary structures of all kinds incident to the construction of said building, and (when not otherwise insured) builder's machinery, tools and equipment belonging to the insured *or similar properties belonging to others for which the insured is liable,*" or "for which the assured are or may be liable," or "and provided the assured is legally liable therefor, this policy shall also cover such property sold but not delivered, held in trust or on consignment or for storage." Other similar combinations of language are employed.

One of the landmark cases where various aspects of the problem inherent in the "in trust" and "on commission" conditions were before the court, is *B. N. Exton & Co. v. Home Fire and Marine Ins. Co.*[37] The New York Court of Appeals, opinion by Justice Crane, unanimously concurred in by Justices Cardozo, Pound, Andrews, Kellogg, and O'Brien, cited with approval the statement from *Waring v. Indemnity Fire Ins. Co.*[38] as follows:

> " 'The phrases describing property "as held in trust," or "on commission," and kindred terms, in a policy to an agent, factor or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract. . . .' "[39]

In *Burke v. Continental Ins. Co.*[40] the court said:

> ". . . . The words 'in trust' may, with entire propriety, be applied to any case of bailment where the goods belonging to one person are entrusted to the care of another, for which the bailee is responsible to the owner."[41].

In *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* [42] the court said:

> "The expression 'held in trust,' as used in insurance policies, means simply that the goods or property are in the custody of the insured."[43]

The phrases which have been most widely misinterpreted are "for which the insured is liable," "provided the insured is liable," "legally liable," or such similar phrase. There has been much litigation with respect to the intent of these phrases. The majority rule is that such language should properly be interpreted to refer to the responsibility of the bailee to account for property and that such phrase is merely descriptive of the property covered by the policy. In view of the importance of this point and because it is unfortunately true that there is still some misunderstanding or disagreement on the part of some, including insurance men, it may be helpful to examine and cite at some length from certain of the leading authorities which are representative of the majority rule.

The Supreme Court of Illinois has left no doubt as to the rule in this state. In fact, the cases of *Home Ins. Co. v. Pekin & P. U. Ry. Co.*[44] and subsequent Illinois cases hereafter noted, are often cited to-

[37]249 N.Y. 258, 164 N.E. 43 (1928).

[38]45 N.Y. 606 (1871).
[39]249 N.Y. at 261, 164 N.E. at 44.
[40]184 N.Y. 77, 76 N.E. 1086 (1906).
[41]*Id.* at 82, 76 N.E. at 1087.
[42]73 S.W. 545 (Tex. Civ. App. 1903).
[43]*Id.* at 546.
[44]178 Ill. 64, 52 N.E. 862 (1899).

gether with the New York case of *B. N. Exton & Co. v. Home Fire and Marine Ins. Co.* as illustrative of the majority rule.

In *Home Ins. Co. v. P. & P. U. Ry. Co.*, the railroad company was the owner of certain railroad yards in Peoria and was engaged in doing a switching and terminal business. Certain railway cars belonging to other railroad companies were destroyed in a fire and the railroad company brought suit to recover the loss sustained on property of others in its possession. The policy provided for extensive coverage, including the following clause:

> "44. $50,000—On freight cars of every description, the property of other roads, firms, individuals or corporations, *for which the assured are or may be liable*, while on the line of their road, the limit of loss, if any, on any one freight car not to exceed $500."

A judgment in the trial court in favor of the plaintiff was affirmed by the Appellate Court for the Second District[45] and affirmed on appeal by the Supreme Court of Illinois. The supreme court said:

> ". . . . It was not the intention of the insurer to insure any and every freight car belonging to 'other roads, firms, individuals or corporations' which might be on the line of appellee's road, but only such cars belonging to such 'other roads, firms, individuals or corporations' on appellee's line of road *as assured had such control of or such connection with as that a liability might accrue against such appellee company to account for such cars to the owners thereof. The phrase is properly construed to be descriptive of the cars to be insured.* Had it been the intention of the insurer to insure the liability, only, of the assured to respond to the demands of the owners of the cars, this intention could have been readily and unmistakenly manifested by the use of apt words and phrases.
>
> ". . . .
>
> "Nor is the right of recovery limited to such cars as it should be made to appear by evidence the appellee company was absolutely *legally liable* to account and pay for to the owners thereof. The proper construction of the policy in this respect is, that all freight cars consumed by the fire while on the line of the appellee's road and in its care and custody, with respect to which it had some duty to perform of such nature it might be charged with *legal liability* to account to the owners therefor or to be subjected to claims and demands to so account, and to possible litigation growing out of such claims and demands, were protected by the policy.
>
> "The contention the word 'liable,' incorporated in item 44, means an absolute legal and fixed liability, is not tenable. . . . The word as used in the policy does not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability may arise. The word, as most frequently used, does not necessarily exclude the idea of a contingency. . . . Law writers and courts, without improper use of language, may and do declare the liability of a warehouseman begins when the goods are delivered, etc., and such liability ends on the delivery of the property to the person rightfully entitled to it, without being understood to assert that an obligation on the part of the warehouseman to answer in any manner has become fixed and absolute. The correct meaning of such expressions is that the warehouseman has such connection with the property as that a fixed liability may arise. The italicized phrase in said item 44 was intended to indicate the policy was to protect cars to which the appellee should bear such relation as to become charged with the performance of duties which might involve a fixed legal liability."[46]

One of the most recent well-considered opinions on the subject is the federal case of *United States v. Globe & Rutgers Fire Ins. Co.*[47] We shall take the liberty of quoting extensively from the opinion since the court so aptly gets to the heart of the controversy. The six policies in question covered the assured for loss by fire, and

[45] *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 78 Ill. App. 137 (2d Dist. 1898).

[46] 178 Ill. at 69-71, 52 N.E. at 863-64. (Emphasis added.) Later Illinois cases which have cited with approval the language in the *Home Ins. Co.* case include *Sanders v. Merchants State Bank*, 349 Ill. 547, 182 N.E. 897 (1932); *Evans v. Illinois Surety Co.*, 298 Ill. 101, 131 N.E. 262 (1921); *Phenix Ins. Co. v. Belt Ry. Co.*, 182 Ill. 33, 54 N.E. 1046 (1899).

[47] 104 F. Supp. 632 (N.D. Tex. 1952), *affirmed*, 202 F. 2d 696 (5 Cir. 1953).

each contained a clause reading "provided the insured is legally liable therefor, this policy shall also cover such property sold but not delivered, held in trust or on consignment or for storage." The question for decision was whether the policies insured the cotton seed which had burned or only insured any liability of the gin company for the fire loss of said cotton seed. The court noted some of the controversial points and said:

". . . . The decisions in this general field of litigation have been diverse, partaking of the multiform policy provisions from case to case. In contrast are those cases where the policy clearly insured the *property*, and those cases where with equal clarity the policy insured only the *liability* of the insured with respect to the property. Still other cases disclose policy provisions somewhat akin to the terms of the policies in question, but also other alternative and disjunctive provisions, and the decision finally turned on a provision dealing directly with the described property. . . .

"The contention of the defendants is that the plaintiff cannot recover under the present policies without showing that the insured is legally liable for the fire loss of the cotton seed. That view is quite arguable. The pertinent provision of the policies has been quoted in full above and the central phrase thereof reads 'provided the insured is legally liable therefor.' The words 'liability' and 'liable' have manifold meanings in law and that nuance makes 'liable' fit as well in respect to one bound to respond in duty as to one bound to respond in damages. The gin company under its caretaker duty as bailee for hire certainly was responsible for the cotton seed and obligated to keep and deliver same safely, subject to exoneration only if performance be prevented without negligence on its part. That was a present and positive liability, and in fact no other liability ever supervened. In other words that liability in being was complete, and adequately answers the terms of the policy provision. Nothing novel is being stated. In the typical instance of bailment relationship a proper delivery of the property thereupon satisfies the right of the bailor and discharges the liability of the bailee, but that does not gainsay the fact that the bailee bore a legal liability during the period of the bailment."

The court then went to the heart of the question:

"Of course when construing flexible language the best key usually is the context. The entire language of the relevant policy provision in its ordinary sense consistently points to insurance on *property*, not on the insured's *liability* for a fire loss on such property. A strained construction is required to say that 'legally liable therefor' in the central phrase defines the thing insured. Instead the more natural reading is that it defines a selective condition on the thing being insured. A simpler statement perhaps is that said central phrase is really some of the descriptive language identifying the property insured. . . .

"If the policy provision in fact read 'on the liability' of the insured then to be sure it only could mean liability for fire loss of the property, and the plaintiff would fail in the suit. This is true for the simple reason that a fire insurance policy, like many forms of insurance, is a contract of pecuniary indemnity. Its subject matter must have a money measure. Such insurance on *liability* cannot become payable apart from an incurred liability of the insured for money damages or at least a pecuniary obligation. The present policies however plainly purport to insure *property*, not only property of the specified kinds belonging to the insured, but also property of like kind, for which insured is liable, belonging to another owner, and the reasonable construction of the insurance contract is that the central phrase of the policy provision means liability of the insured already present and not contingent liability ushered in by a fortuitous fire. If the contrary meaning had been intended it would have been easy to state same in unmistakable terms.'"[8]

It is of some interest to contrast the decision in the later case of *Texas City Terminal Ry. Co. v. American Equitable*

[8] *Id.* at 633-34.

Assurance Co.[49] In this decision, the court concluded that the policy language was distinguishable from the conditions contained in the policy involved in the *Grobe & Rutgers* case. The litigation arose by reason of the very substantial damage occasioned in the Texas City explosion of 1947. The American Equitable carried an explosion policy for plaintiff which covered plaintiff's buildings, tanks, sheds, trestles, platforms, equipment, rolling stock, and the like. The policy contained a ninety per cent co-insurance clause and an "in trust and on commission" clause, as follows: "It is understood and agreed that this insurance also covers the interest of the assured in and/or liability for similar property belonging in whole or part to others, and held by the assured either sold but not removed on storage or for repairs, or otherwise held." The property damage involved in this case was great. The loss to plaintiff's property was some $4,500,000 and the damage to property of others stored on plaintiff's premises ran to some $19,600,000. On the other hand, plaintiff carried one blanket explosion policy with defendant insurer with limits of $2,300,000. The insurer contended that its policy extended coverage to all property on plaintiff's premises, including the property of others, and that the ninety per cent co-insurance clause should be applied to this total amount, even though the owners of the other property were making no claims of liability against plaintiff. If the position of the insurer was correct, the effect would limit plaintiff's recovery for its own loss to about ten per cent.

The opinion considers many of the leading cases on both sides of the question of whether the "in trust and on commission" clause should be interpreted as coverage on property or construed as liability insurance. The court disallowed the insurer's claim and held that the defendant's policy constituted liability insurance and did not cover the property of others in the possession of the insured. The soundness of the court's reasoning on this point would appear to be subject to question. It has been suggested that the court may have been influenced in its decision in concluding that the language of the policy should be distinguished from that involved in the *Globe & Rutgers* case to avoid what it believed to represent an inequitable or unjust result. Regardless of whether the court was right in denying the position of the insurer on the foregoing premise, the court also found another reason for denying the insurer's position that the goods of others were covered under its policy. The court referred to the fact that plaintiff's property covered buildings, tanks, sheds, etc., whereas the property of others referred to includes the "interest of the insured and/or liability for *similar property* belonging in whole or in part to others."

The court then said:

> ". . . . The property of others on the Terminal premises was not 'similar property' within the terms of the above provision. The word 'similar' has been variously defined as exactly alike, . . . or as a synonym for the word 'like,' . . . or being like in quality, nature, degree, purpose, or other characteristics. . . . The Terminal's business was the operation of a terminal railroad. . . . [T]he property insured consisted of the Terminal's operating facilities, equipment and supplies used or to be used in the maintenance and operation of the facilities and business of the Terminal. 'Similar property' within the meaning of American Equitable Group's 'liability' clause would necessarily mean and be limited to property in the nature of operating facilities, equipment and supplies for use in connection therewith. The goods of others which American Equitable Group contends are similar property consist of cargo in course of commerce such as bagged flour, tin bullion, tin ore, bullion racks, knocked down French box car parts, bagged rice, bagged fertilizer, bagged sulphur, wool, mohair, wheat, carbon black and jute bagging. These goods stored on the premises are not 'similar' to the operating facilities, equipment and supplies of the Terminal but are entirely dissimilar in quality, nature, degree, purpose and other characteristics."[50]

An important point which the court, for the reasons expressed, was not required to decide was whether the co-in-

[49]130 F. Supp. 843 (S.D. Tex. 1955).

[50]*Id.* at 860. See *Krakowski v. United States*, 161 Fed. 88 (2 Cir. 1908), where "similar" is defined as "exactly alike."

surance clause was applicable to the total value of all the property of the insured as well as the value of the property of others in the possession of the insured. There has been little or no litigation which has reached the higher courts with respect to this controversial question. It is obvious that this is of great importance because the value of property of others in the possession of bailees may fluctuate from time to time from a very small quantity to values running into millions, as in the *Texas City* case. The intent of each policy of insurance must be determined by consideration of the specific language employed. Where it is clear that the policy extends specific insurance coverage to property of others which is similar to the property of insured, which otherwise represents the principal coverage under the policy, and assuming, of course, that there is no other language which requires a contrary intention, it appears sound to conclude that co-insurance is contemplated with respect to the total values of all property covered by the policy regardless of ownership. The *Texas City* case, of course, illustrates the other extreme, where the property of others is not only dissimilar but, assuming the court to have been correct, the policy language is in other respects interpreted to provide protection against liability and is not held to be descriptive of the property covered. The troublesome cases lie in the area between the two extremes, where confusing or ambiguous language has been employed. As indicated, each case must stand on its own merits.

The case of *Miller's Mut. Fire Ins. Ass'n v. Warroad Potato Growers Ass'n*[51] is frequently cited as upholding a minority view. On the other hand, it may be contended that the decision can be distinguished by reason of the language employed. There, insurance was extended "On stock consisting of potatoes and all other merchandise and supplies not otherwise insured and not more hazardous, handled or used by the insured in their business, their own or held by them in trust or on storage, *if in case of loss the insured* is legally liable therefor, while contained in the insured's warehouse." A fire occurred and destroyed potatoes owned by members of the plaintiff association. Defendant denied liability on the premise that plaintiff was not "legally liable" for the destroyed property. The trial court held for the plaintiff and the court of appeals reversed and said:

> "The policy in suit, by its terms, insured potatoes handled or used by the insured, its own or held by it in trust or on storage, 'if in case of loss the insured is legally liable therefor.' If the quoted words were omitted, the policy would undoubtedly have covered all potatoes in storage contained in the warehouse, although not owned by the insured and although it was not legally liable for their loss. California Insurance Co. v. Union Compress Co., 133 U.S. 387, 10 S. Ct. 365, 33 L.Ed. 730; Home Insurance Co. v. Baltimore Warehouse Co., 93 U.S. 527, 23 L.Ed. 868. The presence of these words, however, negatives any intention on the part of the insurers to cover potatoes in storage for the loss of which the insured was not legally liable. It is plain, therefore, that this policy did not insure potatoes in storage, but covered only the liability of the insured to the owners in case of loss by fire."[52]

It may also be observed that where used in the same general context or arrangement of words in clauses of this type, most courts appear to make no distinction between "legally liable" and "liable." In *Home Ins. Co. v. Moore & Rawls,*[53] coverage was afforded on cars in the possession of the lumber company or the railroad, for which they were "legally liable." The cars were damaged in a fire and the insurer defended on the ground that the assured was not "legally liable" for these cars. The court said:

> "Counsel for the appellant, the insurance company, insists that the insurance policy, according to its terms, and the use of the words, 'for which they are legally liable' (referring to

[51] 94 F. 2d 741 (8 Cir. 1938).

[52] *Id.* at 742. To the same effect, see *Sanford Mfg. Co. v. Western Mut. Fire Ins. Co.*, 229 Iowa 283, 294 N.W. 406 (1940); *Kellner v. Fire Ass'n*, 128 Wis. 233, 106 N.W. 1060 (1906).

Some courts have held that there is coverage even though there is included in the form or policy "provided the insured is legally liable therefor." *Commonwealth v. Hide and Leather Ins. Co.*, 112 Mass. 136 (1873); *Pittsburgh Storage Co. v. Scottish U. & N. Ins. Co.*, 168 Pa. 522, 32 Atl. 58 (1895).

[53] 151 Miss. 189, 117 So. 524 (1928).

Moore & Rawls) referred only to a liability imposed by law as distinguished from liability created by contract, and that the language of this contract did not comprehend any indemnity of the insured against a liability created by contract.

"We think it manifest, from the language used, that the insurance company did indemnify Moore & Rawls for any liability which the law imposed directly or by contract. . . ."[54]

In *Brooklyn Clothing Corp. v. Fidelity-Phenix Fire Ins. Co.*,[55] suit was brought on a bailee policy which covered "interest in and legal liability for property held by [them] in trust . . . or for repairs." Goods were destroyed in a riot, which was one of the insured risks. The appellate court reversed a summary judgment and said:

"The words 'legal liability' in this policy must be held to embrace the contractual liability which the plaintiff assumed on receipt of the goods from the owner. This construction is adopted solely because of the evidence of the character of the insurance; otherwise, the policy means nothing at all concerning the plaintiff's interest in the goods of the owner."[56]

The distinction sometimes drawn between "legal liability" and "liability imposed by law" was discussed in *Wexler v. National Ben Franklin Ins. Co.*[57] There the plaintiff was owner of goods which had been delivered into the possession of a manufacturer which was insured by defendant. In a suit by the bailor against the insurer of the bailee, the insurer set up the defense that plaintiff had no right to bring such an action and, further, that there was no "legal liability" on the part of the manufacturer. In holding for the plaintiff and allowing recovery, the court said:

". . . . Since the policy insures against the insured's 'legal liability' for the property of others in his possession and not against 'liability imposed by law' for such property, it is not necessary for the bailor to reduce his claim to judgment; the insured incurs the liability, within the purview of the policy coverage, upon the mere happening of the contingency insured against."[58]

It is universally held that the bailee has an insurable interest in property in his custody and possession. When he insures property of others in his custody, he may collect the full value in the event of loss. This is true whether or not the bailee has a liability to the owner. A representative statement of this rule is found in the leading case of *Home Ins. Co. v. Baltimore Warehouse Co.*,[59] where Justice Strong of the United States Supreme Court said:

". . . It is undoubtedly the law that wharfingers, warehousemen, and commission-merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners."[60]

Further, it has been held that parol evidence is inadmissible to show that the parties did not intend that the bailor's

[54] *Id.* at 198, 117 So. at 526.
[55] 205 App. Div. 743, 200 N.Y. Supp. 208 (1923).
[56] *Id.* at 747-48, 200 N.Y. Supp. at 211.
[57] 281 N.Y. Supp. 949 (1935), *rev'd on other grounds*, 160 Misc. 282, 289 N.Y. Supp. 866 (1936).

[58] *Id.* at 953. In *Eberhard v. Aetna Ins. Co.*, 134 Misc. 386, 235 N.Y. Supp. 445 (1928), the court said:
". . . If liability imposed by law be insured against, the obligation of the insurer does not come into being until the rendition of judgment . . . In such case the happening of the contingency is the event insured against, and the recovery of the judgment is the manner in which the insured proves to the insurer that the intrinsic character of the happening was such that he was liable for the consequences of it. And where the insurer agrees to insure against liability without providing for a particular mode of establishing such liability, it would seem that the assured, upon proof of the happening of one of the contingencies insured against which renders him responsible to another for the damage sustained by such other, incurs the liability within the purview of the policy coverage. Liability is a broad term of comprehensive significance. It is synonymous with amenability or responsibility. Generally speaking, it expresses some form of obligation, and, when applied to contracts, refers to legal responsibility." *Id* at 388, 235 N.Y. Supp. at 447-48.
[59] 93 U.S. 527 (1876).
[60] *Id.* at 543. This is the established rule. Other cases to the safe effect include *United States v. Insurance Co.*, 65 F. Supp. 401 (W.D.S.C. 1946); *Krupp v. National Fur Dressing & Dyeing Co.*, 250 Ill. App. 282 (1st Dist. 1928); *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S.W. 711 (1897); *Southern Cold Storage & Produce Co. v. A. F. Deckman & Co.*, 73 S.W. 545 (Tex. Civ. App. 1903); May, Insurance § 424 (1873).

property was to be covered under the bailee's policy.[61]

As a corollary, the bailee may maintain a cause of action against a third party tort-feasor who has damaged the bailed property. In *Walsh v. United States Tent & Awning Co.*[62] the court cited with approval a statement from *Woodman v. Nottingham*,[63] as follows:

> ". . . . 'The defendant being found a *wrong doer*, the plaintiff may be regarded as bailee both of the horses and money, and in that capacity, holding a special property in such chattels, and sufficient to entitle him to recover in his name for the entire injury. A bailee, having a special property, may recover the whole value of the property, holding the value beyond his own interest in *trust* for the general owner, and the judgment recovered by the bailee may be pleaded in bar to any action that might be afterwards brought by the general owner for the same property.' "[64]

As to the theory underlying the right of the bailee to recover from a tort-feasor, it was said by the Supreme Court of Connecticut in *Railway Express Agency, Inc. v. Goodman's N. Y. & C. Exp. Corp.*:

> "The courts are not in agreement as to the true basis of the right of the bailee to recover. 6 Am. Jur. 387, § 303; Holmes, Common Law, 167; 2 Beven, Negligence, 4 Ed., p. 907 et seq. Some rely on consent; Terry v. Pennsylvania R. Co., [156 Atl. 787]; some on the right of possession; Brewster v. Warner, 136 Mass. 57, 49 Am. Rep. 5; and still others on the special property of the bailee in the goods bailed; Central Railroad Co. v. Bayway Refining Co., 81 N.J.L. 456, 79 A. 292, Ann. Cas. 1912D, 77. Justice Holmes concludes in the Brewster case that the true theoretical right is based on possession. The reliance on a special property right is an almost necessary corollary to the modern doctrine that a bailee recovering full damages must account to the bailor for any excess over his special interest, such as, in this case, transportation charges. Gillette v. Goodspeed. . . . We hold that the theory supporting the bailee's right to recover on the ground of possession or special property is supported by the better reason and authority and that the defendant's claim, based on consent, is not valid. 1 Sutherland, Damages, § 139; Dobie, Bailments, pp. 27, 62."[65]

ACTION BY BAILOR AGAINST BAILEE'S INSURER

Of equal importance is the question of whether the owner may elect to sue the bailee's insurer, particularly where the bailee fails or refuses to take action at the request of the bailor. Perhaps the leading United States authority upholding the right of the owner to maintain a direct action against the insurer of the bailee is the oft-cited case of *B. N. Exton v. Home Fire & Marine Ins. Co.*[66] In that case, the insurance company issued its policy wherein it agreed to indemnify Miller, Tompkins & Company against loss by

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[61]See *Hough v. Peoples' Fire Ins. Co.*, 36 Md. 398 (1872); *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 20 (1862); *Ferguson v. Pekin Plow Co., supra* note 60.

[62]153 Ill. App. 229 (1st Dist. 1910).

[63]49 N.H. 387 (1870).

[64]153 Ill. App. at 231.

[65]129 Conn. 386, 389, 28 A.2d 869, 870 (1942). Other cases where the bailee has been allowed to recover from a tort-feasor include *Smythe v. Fidelity & Deposit Co.*, 125 Pa. Super. 597, 605, 190 Atl. 398, 402 (1937): ". . . There can be no doubt about the rule that a bailee in possession of personal property is entitled, as against a third party, to recover the full value of the bailed property in case of its destruction or conversion by the third party, the bailee being liable over to the bailor for any damage recovered in excess of his interest. . . ."; *Gillette v. Goodspeed*, 69 Conn. 363, 37 Atl. 973 (1897); *Motor Finance Co. v. Noyes*, 139 Me. 159, 28 A. 2d 235 (1942); *Industrial Ins. Co. v. King*, 159 Miss. 491, 132 So. 333 (1931); *Fletcher v. Perry*, 104 Vt. 229, 158 Atl. 679 (1932); see also 6 Am. Jur., *Bailments* §§ 302-04 (rev. 1950).

In *Harris v. Seaboard Air Line Ry. Co.*, 190 N.C. 480, 130 S.E. 319 (1925), the court said:

> ". . . It has been uniformly held that the bailee has a right of action against a third party, who by his negligence caused the loss of or an injury to the bailed articles, and this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss. 5 Cyc. 210, 6 C.J. 1149, § 111, 3 R.C.L. p. 138 § 62." *Id* at 483, 130 S.E. at 321.

On the other hand, an action by the bailee prevents a subsequent action by an owner. In *Hardman v. Brett*, 37 Fed. 803 (S.D. N.Y. 1889), the court said:

> ". . . Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrong-doer, discharges the latter from all liability to the owner.' *Id.* at 805.

[66]249 N.Y. 258, 164 N.E. 43 (1928).

fire of "stocks, materials and supplies, including labor performed thereon . . . , the property of the assured or held in trust or on commission or sold but not delivered or held in joint account with others and also the property of others for which the assured may be or agreed to become liable in case of loss or damage by fire."

The opinion pointed out that the *named insured had not agreed to become liable for the property* of the Brown Company in case of loss or damage and in fact, *was not liable for any negligence* in causing the fire. The named insured refused to include any claim for the Brown Company's loss. With notice of the claims and the loss of the Brown Company, the defendant insurance company settled directly with its named insured but failed and refused to pay the loss of the Brown Company. Plaintiff in the action was the assignee of the Brown Company, and it filed a direct action against the insurer. The court in holding that the action might be maintained by the owner, cited with approval the reasoning in *Utica Canning Co. v. Home Ins. Co.*[67]

> ". . . . While [the *Utica Canning* case] did not come to this court, we see no reason for departing from the principles and the result there stated. True, the presiding justice in his opinion included a quotation which said that this form of 'trust or commission' policy is similar in its legal effect to the policy 'for whom it may concern,' and arises in much the same way. Even though the latter clause, generally found in marine policies, is much broader than the former phrase used in fire insurance policies . . . , *the reasoning of the opinion is correct and would not be affected by omitting the comparison.*"[68]

The court then proceeded to the terse, lucid statement of the law which sums up all that can be said on this subject:

> "The Brown Company's paper was therefore covered by the defendant's policy. Yet it will do the company little good unless this action can be maintained. Miller, Tompkins & Company refused to include the loss in its proof of claim; it settled for the damage to its own property leaving out the Brown Company, and of course, refused to maintain any action on the policies in behalf of the latter company. Its position was and is that the policies did not cover the Brown Company's damage. The insured's companies took a like position in settling of the Brown Company's loss and claim. Unless this action lies, the Brown Company and its assignee are without remedy. Such lapses the law seeks to avoid."[69]

CONCLUSION

We must here pass without comment many other collateral problems which may be equally important to bailors, bailees, and their insurers. Many questions have arisen, to enumerate but a few illustrations, with respect to agreements for floor planning and various conditional sales arrangements and policies of insurance covering single and multiple interests; various types of mutual undertakings where one or both parties have agreed to insure certain hazards to which one or the other may be subject; problems relating to definition and construction of hazards and conditions of insurance, or location or situs of property, insurable interest, representations and warranties, fraud, mistake, reformation of contract, termination and cancellation, compliance with conditions precedent, waiver, and the like.

As a concluding observation, it appears obvious that the present tempo and complexity of trade and commerce require that closer and more constructive thought be devoted to the specific agreement or arrangement involving bailment of property. It is trite to say that it is of utmost importance to the parties and their respective insurers that they not only be aware of their rights and responsibilities but that their intent with respect to such transactions be crystallized into appropriate language. In this respect, the answer must lie in a more enlightened approach through utilization of advice of competent insurance and legal counsel.

[67] 116 N.Y. Supp. 934 (1909).

[68] 249 N.Y. at 262, 164 N.E. at 45 (Emphasis added.)

[69] *Ibid.* Other cases where owners or bailors of property were allowed to maintain a direct action against the insurer of the bailee include *Pacific Fire Ins. Co. v. Murdoch Cotton Co.*, 193 Ark. 327, 99 S.W. 2d 233 (1936); *General Ins. v. Goldstein*, 45 N.Y.S. 2d 570 (1943); *Smolensky v. Massachusetts Bonding & Ins. Co.*, 120 Misc. 346, 198 N.Y. Supp. 376 (1923); *Czerweny v. National Fire Ins. Co.*, 139 N.Y. Supp. 345 (1913); *Price v. United Pacific Cas. Ins. Co.*, 153 Ore. 259, 56 P. 2d 116 (1936).

Loading and Unloading—Hired Cars—Concurrent Coverage—Industry Recommendations

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AN IMPORTANT committee,[1] representing a very large proportion of the insurance industry, recently published some guiding principles to which member companies have subscribed. Among other problems considered and squarely met by this committee are those concerning "loading and unloading" which have plagued the liability insurance business for many years. When an "automobile" liability insurer and a general or "premises" liability company cannot agree between themselves as to the contribution, if any, which each should make, while machinery has been set up for the arbitration of such disputes, and generally arrangements have been made for the protection of the interests of the respective policyholders, altogether too often the controversy results in litigation. It is indeed surprising that the industry has not, after all these years of confusion as to the intent of the policy contracts, taken resolute steps to clarify the language of the standard policies. Admittedly the subject is extremely complex and the underwriting or rating committees of the various bureaus seem to have been beset with other and more pressing problems from their points of view. Meanwhile the claims men have taken "the bull by the horns".

The public (and the insurance bar) cannot fail to benefit from the following recommendations of the committee which are concerned with the common situation which arises when a truck covered by an automobile policy is being loaded or unloaded on the premises of an insured which carries a general liability policy. It will be recalled that the standard "premises policy" excludes the loading or unloading of automobiles "while away from the premises or the ways immediately adjoining", thereby implying that the intent is to cover this exposure while the automobile is being "used" (or loaded and unloaded) on the insured's property or on any street or highway adjoining his location. When the coverage for the premises is written on a comprehensive general (including) automobile basis, then the premises policy may be concurrent or excess as will be seen.

In such cases the problem and the solution are described as follows in the report of the committee:

(*Class I*)

1) "Example: The truck of B is being loaded at the premises of A. Employees of A drop a pipe that is being loaded, onto the driver of B—B sues A."

Solution: "The auto carrier of B should cover. If held liable, A would have an action against its negligent employees and since the liability policy of A normally would not cover A's employees, the ultimate obligation would fall on B in most cases anyway."

(*Class II*)

2) "Example: The truck of B is being loaded at the premises of A by the use of A's crane. The cable of A's crane breaks, dropping the load on B's driver who sues A."

Solution: "The liability carrier of A should cover." (Premises policy.)

Rule: "Where an accident occurs by reason of *defective equipment of one insured* used in loading or unloading the vehicle of another insured, the carrier of the insured owning the defective equipment should cover." (Emphasis added.)

Comment: "This is a troublesome area and it is recognized that the decisions of various states are in conflict. By the same token, it is a frequent producer of litigation between companies. It is believed that, absent a local decision to the contrary, adherence to the principle as stated

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is logical and fair to all in the long run."

The committee states further that it will welcome the reaction to these principles as well as any suggestions for additional areas of compromise that might be considered. "Surely all (companies) will gain by the peaceful solution of common problems, for the one that you win today (for example, as a general liability insurer) is the one that haunts you tomorrow." (Matter in parenthesis added.)

Discussion

Class I cases: By far the greater weight of the authorities supports the conclusion of the committee that the automobile insurer should stand this kind of case in full, taking over the defense and the indemnity of the "premises employer" and his employee. That this should be the logical solution of the problem under the present standard policies was pointed out by the writer in his article on "Liability Insurance—Loading and Unloading", 345 Insurance Law Journal 745, October, 1951, Footnotes 6 and 7, at page 752; Proceedings of the American Bar Association, Section of Insurance Law, 1951, at page 19, footnotes 11 and 12. Also see the very lucid analysis of recent cases by B. H. Clampett, Esq. of Springfield, Missouri, 25 Insurance Counsel Journal 19, January, 1958.

To supplement the latter article, it might be pointed out that since 1955 the standard liability policies have included a provision for *"Severability of Interests"* which makes it clear that the words "the insured" in these policies mean only the person or organization which is charged with the liability by the allegations of the injured party; likewise, since 1956, the standard Family Automobile Policy has provided that the liability insurance "applies separately to each insured against whom claim is made or suit is brought". As Mr. Clampett points out on page 22, some of the decisions held, contrary to the intent of the underwriters, that certain exclusions of the policy applied to rule out coverage for *"the* insured" as though the exclusion or limitation had read *"any* insured", e.g., the exclusion of employer's or workmen's compensation liability and of property "in charge of or owned by the insured". For additional cases on the subject of "loading and unloading" see page 160 A.L.R. 1259 and Insurance Counsel Journal, January, 1954, p. 67.

The legal basis for holding only automobile insurers in a *Class I case* depends on common law indemnity, whereby the employers of the negligent tort feasors (employees of A) may recover over in an action against their own employees. The principle involved here requires a total lack of any active participation by the employer himself. He must be liable only because of the general rule imposing liability on the employer for the acts of his employees while engaged in their employment (respondeat superior), and not because of any wrong done by him.

Now in a *Class II case,* it would appear that the committee felt that the insurer of the owner or operator of the "defective equipment" or machinery should stand the whole of the loss regardless of any active fault or participation by the employee, the crane operator. The coverage belongs to the insurer of the defective equipment regardless of whether its insured would have an action over and against his employee, the crane operator. Accordingly the insurer of the machinery or the operation thereof should take over the defense of its insured (whether or not it also covers the employee-operator). So long as the accident results from a breakage of the equipment used to unload the automobile, it is evidently felt that the insurer of the owner or operator should take over. Of course, if the rules were otherwise, and if the accident resulted from the manner in which the equipment was operated, then the case would be shifted from Class II into Class I and the coverage would likewise be transferred to the automobile insurer.

It is submitted that the committee need not have limited Class II cases to *defective* equipment; the case properly belongs to the premises policy *whenever* the equipment is furnished by the premises-employer.

Policy Revisions

Note: At this point it might be observed that, as some *automobile* underwriters have suggested, the policy should be amended to exclude coverage for both Classes I and II. This policy should be amended so as to limit or exclude "omnibus coverage" for the premises employer and his employee, in

any case where their negligence forms the basis for their liability to the injured party. Accordingly the language of the standard "Definition of Insured" of the automobile policy should be revised so that the coverage would not be extended to the premises employer or employee in any loading or unloading accident which results from the exclusive fault of the so-called consignee in an unloading case and the consignor in a loading accident. Such a revision is long overdue.

Meanwhile, if the insurance companies in general will follow the above mentioned recommendations, broadly applied, for Class I and Class II cases, they will save on expenses and avoid the usual frictions with their policyholders and producers alike.

Class II—Local Decisions to the Contrary.—In a case cited by Mr. Clampett, *Bituminous Casualty Company v. Travelers Insurance Company,* 122 F. Supp. 197 (D. C. Minn., 1954), the premises employee was charged with having injured the truck driver while using a power shovel to load the truck. The primary liability rested upon the only active tort feasor who was the operator of the shovel. Did the committee intend this case to be covered exclusively by the premises policy in all jurisdictions, except possibly the district court where this particular decision was handed down, even though the case involved no "defective equipment"? If so, their language does not express their intent.

Likewise in *Pleasant Valley Lima Bean Growers and Warehouses Association v. Cal-Farm Insurance Company,* 298 P. 2d 109, 142 Cal. App. 2d 126, (1956), a premises employee was charged with having negligently operated a machine devised to unload a truck filled with beans. The court found that the sole proximate cause of the accident was the negligence of the premises employee and that there was no separate concurring negligence on the part of his employer who was therefore liable solely on the theory of respondeat superior. Since there was no coverage for the premises employee under the premises (usual form) liability policy, the sole coverage as to him was afforded by the automobile policy covering the truck. (Class I)

Applying the rule for Class II cases to this situation, if the accident had been the result of negligent maintenance of the unloading machinery and defective equipment the coverage would remain exclusively with the premises policy. However, in view of the exception of "local cases to the contrary", the automobile insurer should (Minn.) take over this loss to the exclusion of the premises insurer.

Excess Coverage—Non-Owned Auto

The *Pleasant Valley* decision, above, introduces a novel feature into the "loading and unloading" problem by reason of a provision in the premises policy in question, which happened to be a comprehensive automobile-general liability policy. Its "other insurance" condition read: "the insurance under this policy with respect to loss arising out of the use of any *non-owned automobile* shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise."

Accordingly, the court held that the automobile policy covering the truck (which was being "used" for the purposes of unloading by the premises employer and employee) constituted *primary coverage,* since the truck was *not owned by the* (premises) *insured.* In view of this conclusion, it was unnecessary to apply the "common law indemnity" rule in order to hold that the automobile insurer furnished the primary (and only) coverage for the damages suffered by the injured truck driver. This was a *premises* "non-owned auto" case.

Conclusion—Possibly in California, especially if the premises policy is a comprehensive-automobile-general policy, under the exception established by the committee in Class II cases, the automobile policy should be deemed to cover. Whether the same conclusion should be reached elsewhere in Class II cases, involving a policy having an excess "other insurance" clause, remains to be clarified. Our preference would be to adhere strictly to the rule in Class II cases even when there is an excess clause involved. Actually the excess clause in question was intended by underwriters (but not so stated) only to apply to the operation of non-owned auto-

mobiles in the business of the named insured *off the premises.* Since the cause of the accident was the negligent use of mechanical equipment provided by the premises employer or because of the defective nature of such equipment, the coverage should remain with the premises policy, we think. Does the committee agree?

See also *Maryland Casualty Company v. New Jersey Manufacturing Casualty Insurance Company,* 128 A. 2d 514 (N. J. Super., 1957), discussed by Mr. Clampett on pp. 20 and 22 of his article, where the premises employer and employee were held covered by the automobile policy in a case involving a "lift truck", not stated to have been defective equipment, except for the employee and workmen's compensation exclusions (which we have explained above could no longer be held to apply under the severability of interests provision of the new policies). It is submitted that companies subscribing to the guiding principles would deem that case covered exclusively by the auto policy (Class I) but that the committee should amend its definition to include this as a Class II case.

Also, in *Indemnity Insurance Company v. Old Dominion Hoisting Service,* 251 F. 2d 382 (U. S. Ct. of Appeals for D. of C., 1958) where it was held that subcontractors unloading the truck negligently with cranes were covered under the auto policy, should be deemed a Class II case in all jurisdictions (except the District of Columbia, California or New Jersey). However, it is again pointed out that literally under the rules, no defect in the equipment being apparent, this is presently a Class I case.

Excess Coverage—Hired Auto

In view of the wide acceptance by the public of comprehensive automobile or comprehensive automobile-general liability policies or basic automobile policies with "hired car endorsements", the following seems pertinent: It will be recalled that the premises policy in *Bituminous Casualty Corporation v. Travelers Insurance Company,* 122 F. Supp. 197 (D. C. Minn., 1954) was a comprehensive automobile general policy, covering the use by the insured of automobiles either owned or hired by the insured. This form defines "hired automobile" as "an automobile used under contract in behalf of, or loaned to, the named insured (excluding automobiles owned by the policyholder, its executive officers or employees who furnish their own cars and are paid operating allowances for them)" (Matter in parenthesis explains exceptions omitted from the quotation.)

Under the facts in this case the premises policyholder "Quarry Co." contracted with the government to furnish powdered lime to farmers at a price. The automobile policy holder, Williams, had made what the court describes as "a bilateral contract" with Quarry Co. for the benefit of the farmers and the government. Williams, who was injured while having his truck loaded by Quarry Co.'s power shovel operated by the premises employee, Wegman, agreed to collect $1 per ton from each farmer to which he delivered the lime and to keep $.70 of this for his expenses and services, remitting $.30 per ton to Quarry Co." The court found that under the above quoted definition, Williams' truck was a "hired automobile" since it was being "used under contract in behalf" of Quarry Co. The premises insurer, in order to obtain coverage for its insured and Wegman under the Travelers' policy had alleged that they were "using" Williams' truck for the purpose of loading it with lime to be delivered to the customers of Quarry Co. and the government:

> "The Court is constrained to find, therefore, that the language used in this *definition of a hired automobile is broad and comprehensive,* and the interpretation accorded thereto should be free from any narrow or strict construction. The Williams truck was a hired automobile *and not a non-owned automobile,* as these terms are defined in the Bituminous (premises) policy." (Emphasis and "(premises)" added.)

The court then proceeded to find as noted above that not only was the use of this truck covered under the premises policy's "definition of insured" as anyone "using * * * a hired automobile" (meaning in this case the Quarry Co. and the shovel operator)—but also that these same parties were covered by the automobile policy written by Travelers on Williams' truck and that the coverage afforded by each of the policies "stems from Wegman's

negligence", pointing out that there was concurrent coverage with respect to the premises employer and employee under each of the policies (Note, that it was necessary to find that the truck being loaded was a "hired automobile" in order to find that the premises policy covered the shovel operator.)

No Excess Coverage—Bituminous, the premises insurer, was *held* not to have been an excess insurer because of the peculiar wording of its "other insurance" condition which was not excess for hired autos—only for non-owned autos. (There was pro rata coverage.)

Note: Under the standard form of "other insurance" condition in the comprehensive automobile-general liability policy of today, probably the ruling would have been the same in the *Bituminous* case. If there is other insurance available to the insured, then the insurance for hired cars is to be shared pro rata with such other insurer, unless the hired automobile was "insured on a cost of hire basis", in which event the coverage would be excess over such other insurance and that would be true also for the use by the insured of "any non-owned automobile". (The court had found that by definition the truck involved was not a "non-owned automobile".) "Cost of hire" is otherwise defined in Condition 1 subd. 6 of the policy. It is intended that the amount paid by the insured for the use of hired automobiles, including the entire remuneration of any of insured's employees engaged in the operation of such automobiles shall be included in the "cost of hire" upon which the premium is based with certain maximum limitations. (The Bituminous policy in question made no reference to "cost of hire" nor to excess insurance for hired automobiles in its "other insurance" clause as does the present standard comprehensive automobile policy). Unless the policy premium was to be based on the "cost of hire" of the hired automobile, in the event of other insurance available to "the insured" (premises employer and employee), such other insurance would be on a pro rata basis rather than an excess basis (which was the court ruling in the *Bituminous* case).

The automobile insurer, Travelers, also contended that in view of the general comprehensive coverage by the premises insurer, Bituminous, the latter had the primary coverage since "only hazards involving the automobile itself are covered by an automobile policy and that the risks occurring in the general business" (of the premises policyholder) are usually covered by a general liability policy, citing *St. Paul Mercury Indemnity Co. v. Standard Accident Insurance Co.*, 216 Minn. at p. 110 and 11 N. W. 2d 794, but the court, ruling against Travelers, wrote:

> "And although the underwriters may not have anticipated or contemplated overlapping or concurrent coverage as between general comprehensive policies (premises) and automobile liability policies (automobile), nevertheless that result has come about since the phrase 'loading and unloading' has been introduced in the standard automobile policy. And where there is this overlapping of coverage it is difficult to find a basis for concluding, under the circumstances herein, at least, that one has the primary risk and the other has only secondary liability merely because one policy is comprehensive in its coverage and the other is limited to automobile liability." (Matter in parenthesis added.)

Accordingly it was held that the premises and the automobile insurers must divide the damages and judgment (*Williams v. Quarry Co.* and *Wegman*) on the basis of the pro rata clause of the automobile policy. It is submitted that the court erred in not invoking the other insurance clause on the Bituminous policy likewise which would have produced the same practical result.

See *Woodrich Construction Co. v. Indemnity Insurance Co.*, (Mnin., 1958), 89 N.W. 2d 412, which was likewise concerned with the definition of "hired automobile" in the standard comprehensive automobile-general policy. At page 422, the court points out correctly that the standard "other insurance" condition did not apply merely (as held in Bituminous) to other insurance *purchased by the policyholder* but applies to *any* other insurance available to any possible "insured". This case did not involve "loading or unload-

ing". It might be called a "use" (of a hired automobile) case, however.

The *Woodrich* case held that where a general contractor assumes control of a truck being used on its road construction project, by directing the backing, preparatory to the unloading, of the truck which was owned by the operator and hired by a subcontractor (both the operator and the subcontractor being absolved from any negligence in the trial of the damage suit): (a) the general contractor is covered as an additional insured by the automobile policy on the truck, construing "use" broadly (as it should be); (b) the truck was a "hired automobile" since it was "used under contract in behalf of the insured (general contractor)" under three comprehensive policies carried by the general contractor and the subcontractor (being a comprehensive general and two comprehensive automobile policies) — in spite of the fact that there was no privity of contract between the truck operator and the general contractor and also despite the absence of any "respondeat superior" liability as between the general contractor and the truck operator; and (c) in view of the finding that this truck was a "hired automobile" and not a "non-owned automobile", the excess coverage provisions of the three comprehensive policies involved (like the excess provision in the *Bituminous* case above) do not apply to rule out concurrent coverage by all of the policies concerned and so the companies were required to share the loss and the expenses of the defense on a pro rata basis.

Note: Here again it might be pointed out that there was no reference in the comprehensive policies involved in the *Woodrich* case in the nature of an exception to the pro rata provisions for distribution of any loss among other insurers except that with respect to "hired automobiles, insured on a cost of hire basis", then the coverage shall be excess over any other available coverage on the hired automobile or otherwise. With such a provision in today's policies, the court would have had to decide whether the truck in question was insured on a cost of hire basis. It is unlikely that this truck would have been so insured on the comprehensive general and the comprehensive auto policy carried by the general contractor; but it might well have been so insured on the comprehensive auto policy carried by the subcontractor who clearly "hired" this truck and its owner-operator. If such had been the case, then the policy carried by the subcontractor would have been excess over the policies carried by the general contractor[2] and over the policy carried by the owner of the truck. Therefore, under today's policies, it will be necessary for the investigators to ascertain whether the hired automobile is "insured on a cost of hire basis". The present policy in Condition 1., Premium, subd. (6) currently states: "the words 'cost of hire' mean the amount incurred for hired automobiles, including the entire remuneration of each employee of the named insured engaged in the operation of such automobiles subject to an average weekly maximum remuneration of $100, provided that such amount shall not include any amount incurred for the hire of any such automobiles which are subject to compulsory insurance requirements of any Federal or Public authority". It follows that when insured on any other basis,[3] the insurance for hired automobiles when considered with respect to other insurance is pro rata or concurrent coverage, rather than excess.

Operating Allowance — The *Woodrich* decision opens up another point for discussion in view of the standard definition of "hired automobile" which appeared in the comprehensive policies involved in that case (and which also appears in today's policies) reading as follows:

"3. *Definitions:* * * * (b) Automobile. Except where stated to the contrary, the word 'automobile' means a land motor vehicle or trailer as follows: * * * (2) Hired Automobile—an automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or

[2]Surely a result not contemplated by the underwriter!

[3]Auto Manual Rules provide that hired autos may be rated ("insured") only as either (1) owned cars at regular rates (usually applied to long term leasings or (2) hired autos at so much per $100 of "cost of hire."

agent of the named insured who is *granted an operating allowance* of any sort for the use of such automobile." (Emphasis mine.)

However, the court held in *Woodrich* that the truck owner-operator was not paid an "operating allowance for the use" of his truck:

"The evidence is that Baker (subcontractor) paid Zaske (owner-operator) by two separate checks. One check was for his personal services and the other for the use of the truck which had been hired by Baker. The payment for the use of the truck did not include an operating or expense allowance since Baker's and Zaske's uncontradicted testimony is that Baker furnished all the oil, gasoline, and repairs for the operation of the batch trucks."

It is believed that the court's conclusion on this point was correct. The underwriters' intent evidently is that "an operating allowance of any sort for the use of such automobile" means an arrangement whereby the employee or agent of the policyholder receives either a flat rate or a mileage basis or an itemized expense allowance for the operation of the automobile in the business of the policyholder. They did not mean that the use of trucks by a subcontractor as in the *Woodrich* case would fall within this limitation. Under the usual arrangement whereby a truck man is hired by a contractor on an hourly, daily or weekly basis, the truck man receives a flat sum out of which he compensates himself for his services and pays all the expenses of operating and maintaining his truck. In such case, there is no doubt that the truck is a "hired automobile". Probably the correct decision of the Minnesota Supreme Court on this point represents the only legal construction published as yet with reference to the "operating allowance of any sort". It is a point which must be considered by the investigator, especially when there is a "hired automobile" involved in a claim: How was the owner paid for the use of the truck?

Summary

To return to the provisions for Class I and Class II cases, recommended by the committee and supported by companies of the Association of Casualty and Surety Companies and the National Association of Mutual Casualty Companies, there is no reference therein to any policy provisions with respect to "other insurance" and whether such policies call for concurrent or pro rata or excess distribution of the loss. We conclude that this was deliberate.

(1) Class I—The automobile policy covering the user of the truck which is being loaded or unloaded, whether the coverage is provided on the basis that the truck is an "owned automobile", a "non-owned automobile" or a "hired automobile" or an automobile otherwise within the definition of a "hired automobile" and "insured on a cost of hire basis" should defend and indemnify as the primary insurer any premises employer or premises employee who is charged with negligence in the loading or unloading operation.

(Note: The Underwriting Committees may soon amend the automobile policy to reverse this distribution of the loading and unloading hazard so that the automobile policy will exclude coverage for the premises employer and employee, leaving this hazard to be picked up by the premises policy. When, if ever, this revision will take place is unknown. Meanwhile if all companies followed the recommendations of the committee in Class I cases, some of the difficulties will have been overcome.)

(2) Class II—Subject to the foregoing applicable to Class I cases, whenever the accident results from the use of "defective equipment" for the loading or unloading operations, then the insurer of such equipment will defend and indemnify its own insured, regardless of whether its coverage as compared to the coverage provided them under the policy written to cover the automobile being loaded or unloaded is on an excess or contributing basis.

Note: We have herein suggested that the combined committee should reconsider its definition of Class II cases so as to bring in *any* case involving the use of mechanical equipment for the loading or unloading operation, regardless of whether such equipment is defective or not or whether the accident results from the sole negligence of the operator of such equipment or not.

Other Insurance—Same Class

(3) When it comes to a collateral issue between more than one "automobile" insurer or more than one "premises" insurer, then it becomes material to ascertain and determine whether the automobile is covered as a "non-owned automobile", a "hired automobile" or a "hired automobile, insured on a cost of hire basis".

(4) As between two automobile insurers, the one which affords coverage for the automobile owned by its insured is the primary carrier.

(5) The company which affords merely "non-ownership" coverage is the excess carrier. "Hired automobiles" are to be distinguished.

(6) When the automobile is owned or hired (but *not* insured on a cost of hire basis) by the named insured on one policy and is covered as a "hired automobile insured on a cost of hire basis" on another automobile policy, the latter is the excess policy. If the hired automobile is not insured on that basis, then the coverage is concurrent and each company contributes pro rata, neither being excess carrier. (It is fairly well settled by the courts, that conflicting "excess clauses" will result in a pro rata distribution of the loss.)

(7) With respect to automobiles which might in fact be deemed "hired automobiles" except for the limitation in the definition of "hired automobile" in the standard comprehensive automobile and comprehensive automobile-general policies having reference to "an operating allowance of any sort" for the owner-operator thereof, usually the hiring of trucks on construction projects by contractors or subcontractors is not included in this limitation. An "allowance" changes it to a "non-owned" auto.

Personal Injury Plaintiffs' Monetary Recoveries Under Federal Income Tax Law*

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DECIDED CASES have in recent years precipitated two major questions, each of which is considered in this paper.

I

Should Juries in Personal Injury Cases Be Instructed That Paintiffs' Recoveries Are Not Income Within the Meaning of Federal Tax Law?

This portion of this paper presents reasons supporting the writer's conviction that the question just stated should be answered in the affirmative.

An Ohio trial judge has recently instructed a jury in this language:

> "When you have arrived at the amount of your verdict under the Court's charge, you will not add any sum of money to that amount for federal income taxes.
>
> "I charge you as a matter of law that the amount awarded to the plaintiff by your verdict is exempt from federal income taxation."
>
> *Benjamin Kozitko, a minor, v. The City of Cleveland,* Court of Common Pleas, Cuyhoga County, Ohio, No. 658, 519, Artl, J.

Such language (1) correctly states an important item of substantive law (2) *diminishes,* rather than adds to, *the number of subjects* which the jury is to consider (3) does not require the jury to subtract anything from any amount which it would otherwise award the plaintiff, but simply (4) admonishes it *not to add,* on a misconception of the law, any sum to what it would otherwise award, and (5) being purely legal, requires no taking of evidence to support it.

For reasons hereafter stated the Artl* instruction, just quoted, can be improved, in a vital particular, by amending the last paragraph of it to read as follows (new matter italicized):

> "I charge you as a matter of law that the amount awarded to the plaintiff by your verdict is *no income to the plaintiff within the meaning of federal tax law.*"

The captioned question has been answered by the courts of last resort in only nine states. Three of these favor such an instruction. The law is, therefore, still in process of settlement. What shape it takes is highly important.

The phrases "such instruction", "this type of instruction" and equivalents, are used in this article in a generic sense and include the various forms of instruction dealing with the captioned question which have been before courts of last resort as well as the Artl instruction, thus amended. Where such phrases refer only to the Artl instruction, the context will establish this fact.

In these days six-figure verdicts in personal injury cases are not unknown. In at least one instance a verdict of $750,000 has been reported. Some personal injury lawyers envisage a million-dollar verdict as a possibility. Every individual, every business entity, and, in some jurisdictions, every philanthropic foundation is today vulnerable to the possibility of such a verdict. Today's personal injury plaintiff, if the owner of a business, home or family-purpose automobile, may, incident to their use, tomorrow be involved in a mishap resulting in a demand for a verdict in such amount. The question here submitted is, therefore, of critical public interest.

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*A revision of a paper delivered at the Mid-Winter Meeting of the American Bar Association, at Atlanta, Georgia, February, 1958.

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Since Judge Artl's instruction is not to be found in printed law reports the instruction is so referred to in this paper rather than by the title of the case in which it appears.

It is axiomatic that if such an instruction correctly states the substantive law, either litigant is entitled to have it given, barring some overruling contra-consideration.

The substantive law on this question is clear. A statute provides that such recoveries are not income within the meaning of federal tax law:

"(a) In general.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—* * *

"(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; * * *."

U.S.C.A. Title 26, Section 104.

This statutory provision is implemented by an appropriate regulation:

Regulations §1.104 (c).

The British House of Lords has recently answered the captioned question in the affirmative in *British Transport Comm. v. Gourley*, A.C. 185 (2 W.L.R. 41-H.L.), 3 All E.R. 796 (1956)* reversing earlier lower court decisions to the contrary. The law is thus definitely settled in that country in a new form. This development is, alone, sufficient warrant for careful further consideration of the problem by our courts.

The Supreme Court of Missouri has very ably stated the case for such an instruction:

"* * * most jurors, are not only conscious of, but acutely sensitive to, the impact of income taxes. Under the Federal * * * income tax laws * * * the net income of all persons is taxable except such as is specifically exempted. Few persons, other than those who have had special occasion to learn otherwise, have any knowledge of the exemption involved in this case. It is reasonable to assume the average juror would believe the award involved in this case is subject to such taxes. It seems clear, therefore, that in order to avoid any harm such a misconception could bring about, it would be competent and desirable to instruct the jury that an award of damages for personal injuries is not subject to Federal or State income taxes * * *."

Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 (1952).

The Appellate Court of Indiana approved the *Dempsey* case and said:

"* * * It is obvious, * * *, that a refusal to give the instruction could only result in an excessive verdict due to the jury's desire to make the appellee whole after taxes."

Highshew v. Kushto, 126 Ind. App. 584, 131 N.E. 2d 652, 657 (1956). (This case was, however, later overruled by the Indiana Supreme Court *("Highshew v. Kushto*, 235 Ind. 505, 134 N.E. 2d 555 (1956).

The California Court of Appeals has held that such an instruction is proper although not reversible error to refuse it since it is "cautionary" in nature.

Atherly v. MacDonald, Young & Nelson, Inc., 135 Cal. App. 2d 383, 298 P. 2d 700 (1956).

Certain other American court decisions answer our question in the negative. The chief reasons assigned for such holdings can be fairly summarized:

1. Such an instruction introduces matter extraneous and irrelevant to the problems of juries in such cases:

Hall v. Chicago N. W. Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 77 (1955);

Missouri, K., T. R. Co. v. McFerrin (Tex. Civ. App.) 279 S.W. 2d 410 (1955);

Wegner v. Ill. Cent. R. Co., 7 Ill. App. 2d 445, 129 N.E. 2d 771 (1955);

Mitchell v. Emblade, 80 Ariz. 398, 298 P. 2d 1034 (1956);

Atlantic Railroad Co. v. Brown, 93 Ga. App. 805, 92 S.E. 2d 874 (1956).

2. Such an instruction

a. Assumes that, but for it, the jury might make findings or take actions which would be improper:

Hall. v. Chicago & N. W. Ry. Co., supra;

Briggs v. Chicago Great Western Ry. Co., 80 N.W. 2d 625, (1957) (Min. 1957);

Missouri, K., T. R. Co. v. McFerrin, supra;

*While more particularly involving the matters discussed in the second part of this paper, this decision is an important milepost in British law and also in point here.

Mitchell v. Emblade, supra.

b. Is "cautionary" in nature:

Combs v. Chicago, St. P., M. & O. Ry. Co., 135 F. Supp. 750 (1955).

3. Such an instruction is not "* * * in general in the interest of better judicial administration in that * * *" giving it "* * * would give rise to more problems than it would solve * * *"

Combs v. Chicago, St. P., M. & O. Ry Co., supra;

Briggs v. Chicago Great Western Ry. Co., supra.

It is submitted that no one of these reasons, nor all of them together, warrant the refusal of such an instruction, as we here support, for reasons we now point out.

None of these adverse cases considers any form of instruction closely akin to the Artl instruction, amended as suggested. It is therefore by no means certain that even these courts would have held as they did had the Artl instruction been before them.

The *Hall* case is the most important of these decisions, in that it is most quoted and relied upon by other courts. Actually and unfortunately it did not involve the question of the propriety of any proffered instruction whatever. The problem arose in that case upon a mere casual attempt by defense counsel to tell the jury in oral argument that plaintiff's possible recovery was not subject to federal income taxes. In passing upon the problems thus presented the Appellate Court was therefore in position to conjecture that had such an argument been permitted the jury might have proceeded to *subtract something* from what it would otherwise have awarded the plaintiff:

> "And if the jury was to mitigate the damages of the plaintiff by reason of the income tax exemptions accorded him, then the very Congressional intent of the income tax law to give to an injured party a tax benefit would be nullified."

Hall v. Chicago & N. W. Ry. Co., supra.

The Artle instruction, however, rules out the possibility of the jury's *subtracting* anything; it simply tells it *not to add* anything to what it would otherwise find.

Space limitations will not permit detailed comment upon the precise language of the various forms of instruction which were involved in the other adverse cases cited. Suffice it to say that none of them is precisely similar to the Artl instruction and that each of them is vulnerable, in some degree, to certain criticism, from which the Artl instruction is free.

1. *The subject-matter of such an instruction is not only not "extraneous" to the problems of the jury in a personal injury case; on the contrary the enlightenment of the jury on this subject is indispensable to a fair and proper finding of damages by it.*

After liability has been found there remains for the jury the determination of what amount plaintiff shall be awarded.

It is axiomatic that a jury in discharge of its duties not only does but should draw upon its own common knowledge:

9 Wigmore, Evidence, Sec. 2590 (1940).

It is believed that every jury today contains a fair share of ordinary, reasonable, prudent, newspaper-reading, radio-listening, television-viewing people. Most of them are federal income taxpayers.

There are, *de facto* and, in effect, *de jure,* in America today two kinds of dollars, the common, every-day tax-subject dollar and the rare tax-free dollar. The average American, of necessity, spends the greater portion of his days in an earnest endeavor to earn the tax-subject dollar. Whatever the yearly aggregate of such dollars which rewards his efforts, his net disposable income is much less than this aggregate. Labor unions invariably base their wage demands upon what their members will have left after the tax collector's "take". "Take home pay" is therefore a term which is everywhere used. It has become a part of the language of American folklore.

The average American may live and die without getting his hands upon any, or an appreciable number of, non-income dollars. How many readers of this article have ever received any such dollars or can, *instanter,* name an example of such dollars, other than that here discussed?

What is more natural, therefore, than for jurors to assume, unless told by the court, that the law is to the contrary,

that what a plaintiff recovers in a personal injury case is tax subject, not "take home"? To illustrate how important it therefore is for a jury to know whether personal injury damage dollars are federal income tax free or tax subject, assume a person of no earning capacity and no income, say a ten-year-old boy, to be involved. Where the amount awarded and paid is subject to federal income tax at 1956 rates

To yield plaintiff	Would require verdict of approximately
$64,000	$440,000
100,000	840,000
1,000,000	10,700,000

It is therefore, imperatively in the public interest that juries be safeguarded against the possibility of returning a prodigious verdict upon the mistaken assumption that such verdict will be subtracted from by federal income tax requirements.

The writer knows of no tremendous verdict case in which there were special verdicts which explain the reasoning or computations used by the jury. It seems reasonable to believe that, in an indeterminate number of instances, the juries have added to what they would otherwise have found amounts believed necessary to cover the federal income tax collector's "take".

No juror serves for a sufficiently long period of time to qualify him, however able he may be, to write a lucid account of the jury process comparable to the writings of distinguished occupants of the bench as to the judicial process. Both bench and bar therefore lack any dependable knowledge of how an average jury, or a jury in any particular case, thought and acted. At the July, 1957, meeting of the Insurance, Negligence and Compensation Section of the American Bar Association, however, held in New York City, an experiment was conducted which throws a significant light upon what is almost certainly happening in jury rooms everywhere throughout the country.

To take part in this experiment twelve members of a jury *venire* actually in service in one of the civil trial courts of the city voluntarily agreed, with the approval of the judge of the court involved, to attend a Section meeting and participate in the experiment. They were provided with a resume' of the evidence as to damages in a personal injury case which had actually been heard and decided in the courts of New York theretofore. The jury was told to assume the defendant liable. The facts as to damages were then argued, *in extenso,* by two experienced and able trial lawyers and a judge appropriately charged the jury on the question of damages. Nothing was said to it on the subject of federal income tax. The jury then retired to its room to consider its verdict.

With the authority of the court a hidden microphone had been set up in the jury room and the proceedings of this jury were taped. The question whether the lump sum to be awarded was subject to federal income tax was brought up by a juror who asserted, with confidence and positively, that such recovery was not so subject. This assertion was readily accepted by the jury. Suppose, however, that other members of the jury, incorrectly informed, but equally confident, had asserted and had convinced their fellow jurors that such recovery would be subject to such tax. The $60,000 verdict awarded plaintiff would certainly have been much greater.

Fellow practitioners have suggested a highly significant hypothetical situation which, with some supplementation by the writer, follows.

Suppose that a jury has agreed that the plaintiff is entitled to a high five-figure or a six-figure amount. The question is thereupon precipitated as to whether something should be added to take care of possible federal income tax liability. Ten of the jurors take the position that the proper amount should be added. Two, with equal confidence, assert that nothing should be added. By request of the foreman the jury is permitted to return into the court whereupon the foreman presents the problem to the trial judge. Should the incident occur in any one of six states the trial judge probably would feel obliged to tell the jury, whatever his personal view of the matter, that by reason of a decision of the court of last resort of his state, he is not permitted any discretion in the matter but must refuse to enlighten them. In all other states he would be free of a controlling precedent and could instruct the jury substantially in the language used by Artl, J., quoted on the first page of this article, improved as hereinbefore suggested by using the words "not income within the

meaning of federal tax law" in lieu of the words "exempt from federal income taxation".

Instances such as hypothesized have occurred and are believed, by the writer, to be, in the aggregate, countrywide, numerous. A fellow practitioner has written to the writer as follows:

> "It is becoming more common for Foremen of juries to return to the court room for further instructions upon this point. A judge of the Supreme Court of Ohio, for instance, stated that during his tenure as a Common Pleas Judge, five Foremen asked this specific question."

It is, of course, just as important, on principle, that the jury be properly instructed in cases of only small potential verdicts as in those involving large amounts. Nevertheless, the potential big verdict case challenges attention. A certain television program has glamorized and given a sort of numerological personality to the figures, $64,000. If we assume that the jury in our hypothetical case wants the plaintiff to have this heartwarming sum "whole after taxes" the amount of the increment, for which it will thus mistakenly grope, is shown in the table hereinbefore set out, and is shocking.

In light of such considerations, how can it rightly be said that it is "extraneous" and "not pertinent" for a jury to be told the fact that any amount recovered by a plaintiff in a personal injury case is not income and is not subject to federal income tax?

2. *That such an instruction is in part cautionary does not condemn it.*

It should be noted that instructions may be cautionary on the *positive* side as well as on the *negative* side. One cautionary instruction may state the substantive law on a given subject and may then tell a jury to do something or to include something, whereas another may, having likewise stated the law, tell the jury to exclude something or *avoid doing* something. That a requested instruction is cautionary in whole or in part may, it is believed, sometimes be the very thing that warrants giving it.

a. *Such an instruction is both needful and proper.*

Cautionary instructions are among those most commonly given. There are a number of books in which are compiled instructions which have had the approval of courts of record. We have made a study of two such compilations:

> California Jury Instructions, Civil, and adopted for use in the Supreme Court of Los Angeles County, California (1938);
> Randall, Instructions to Juries (1922).

The first of these was compiled by a committee of judges of the Los Angeles Superior Court collaborating with a committee of the Los Angeles Bar Association and with a representative of the Lawyers' Club of Los Angeles County. It therefore embodies well considered and fully sanctioned instructions. The second work was chosen for study because it was readily available to us and because of the large number of Appellate Court approved instructions from every state in the union which are included in it. It is believed that these two works together represent a fair sampling of the material found in such compilations.

To determine the exact proportion of cautionary instructions among those approved by the courts a simple numerical count of the instructions which are, in whole or in important part cautionary, has been made. In making this count, where doubt existed as to whether cautionary elements were present in a particular instruction in substantial degree, such instructions were not included among those listed as cautionary. The count thus made showed that there were present in these treatises cautionary instructions in the following numbers:

	Total Instructions	*Cautionary Instructions*
California Jury Instructions, Civil	230	143
Randall, Instructions to Juries	7271	2851

It thus appears that cautionary instructions have a time-honored and important place in our jurisprudence. Numbered among cautionary instructions are some of those most indispensable to the fair and just handling of jury cases. For courts summarily to reject any and every instruction of a cautionary nature would be, in innumerable instances, to deprive juries of highly necessary information and direction. Active in trial work for thirty-five years, the writer can recall few per-

sonal injury cases of any consequence which went to the jury minus one or more cautionary instructions.

b. *The giving of such an instruction does not adversely reflect upon the jury.*

Closely related to the "cautionary" criticism of the type of instruction here advocated is that voiced by the Illinois Supreme Court in reversing the appellate court of that state:

> "Further, the jury was correctly instructed on the measure of damages, being told specifically the elements that they should consider in awarding damages. Hence, unless it be assumed that they might not follow the instructions, there could be no purpose in mentioning anything about the award not being subject to federal income tax. * * *"
>
> *Hall v. Chicago & N. W. Ry. Co., supra,* 349 Ill. App. 175, 110 N.E. 2d 654 (1953).

The language quoted, it is submitted, premises (1) that because a jury is affirmatively told to take cognizance of a number of proper items it will (2) always somehow, be sure to adopt correct theories and proceed in a correct manner *in all the other respects as to which it is not instructed.*

Carried to its logical extreme this reasoning reduces itself to an absurdity. Why is it necessary to instruct the jury as to what it *should* do if it is unnecessary to instruct is as to what it *should not do?* Why not simply assume that each and every jury, *ab initio,* knows what it should know and will do what it should do? Why instruct the jury at all? It is respectfully submitted that the reasoning of the court in the *Hall* case assumes a degree of infallibility to which only juries in some juridical Shangri-La would be entitled.

The court in the *Hall* case, to sustain the language last quoted, cited a case in which the United States Supreme Court, quoting an earlier opinion by Mr. Justice Holmes, held that in a negligence case *fully developed upon its facts before a jury*:

> "Courts should not assume that in determining questions of negligence juries will fall short of a fair performance of their constitutional function."
>
> *Wilkerson v. McCarthy,* 336 U. S. 53, 93 L.Ed. 497, 69 S. Ct. 413 (1949), Headnote 9.

What was then before that court was a contention by defendant below that the verdict for plaintiff was so unsound as to indicate that the jury considered the defendant railroad an insurer of plaintiff employee and that defendant could not properly have been found negligent.

What the Supreme Court there said may have been proper *as applied to the facts of that case.* But how is it applicable to the *Hall* case where nothing factual or legal on tax questions ever got before the jury? And how can it rightly be said that, in general, to tell juries the truth about an item of substantive law is unsound? Such a general principle not anchored factually has no relevance. As Justice Holmes, the learned author of the opinion in the *Dickerson* case, says: "General principles do not decide concrete cases."

It should be noted, here, moreover, that whereas the court in the *Hall* case rejects the type of instruction here supported, in part, because confident the jury is too knowledgeable, too perceptive and too mindful of its duty to need it, the court also condemns it, in the very same opinion, for the exactly opposite reason that

> "It introduces an extraneous subject *giving rise to speculation and conjecture*" (emphasis added).
>
> *Hall v. Chicago & N. W. Ry. Co., supra,* quoted and supported by *Wagner v. Illinois Central R. Co., supra.*

Isn't this simply another way of saying that, on this subject, the average jury is (1) too stiff-necked and perverse to obey what it is told and (2) so much so that it will be stimulated to error by being told what the law is and by being admonished to follow it?

Surely this form of instruction cannot be unsound for *both* these incompatible reasons. Neither too perceptive to need it nor too perverse to heed it, the average jury is human enough to be helped by this type of instruction rightly to discharge its duties.

While it is, of course, for the court *to tell the jury affirmatively* what it should do, it is, we submit, just as important for the court *to warn the jury against* mistakes which it might otherwise make. As has been heretofore pointed out, the average American lives with and by the fact that the dollars he earns are subject

to federal income tax. That general concept has become a part of his common knowledge, indeed a part of his sublimal self. *Per contra* he knows hardly, if at all, the non-income dollar. And so it will remain when he becomes a juror.

It is, therefore, highly probable that when, as a juror, he is about to award some sadly injured plaintiff some six-figure amount, he will desire to see to it that the plaintiff gets that precise amount. It is, it is submitted, unfair to this otherwise impeccable juror to assert or imply that for him so to desire is misconduct. For him to add something to what he would otherwise award to cover federal income tax is at worst mistaken thinking. Whether mistaken thinking or misconduct, however, it is readily preventable by judicial phophylaxis.

The juror should, it is submitted, be safeguarded against unintentionally doing the defendant an irreparable injury in his zeal properly to provide for the plaintiff. This requires only that he be told the simple truth that what the plaintiff gets is not income, within the meaning of the federal income tax law, and that nothing should be added to take care of such a tax.

3. *Inherently proper, such an instruction is warranted by sound judicial administration.*

In a recent federal case the court said:

"In the final analysis it would seem that the matter of the giving of an instruction such as that requested in the present case should be determined from a viewpoint of judicial administration. A greater number of the courts are apparently of the view that the giving of such an instruction would not in general be in the interest of better judicial administration * * *."

Combs v. Chicago, St. P. M. & O. Ry. Co., supra, 135 F. Supp. 750 (1957).

It is respectfully submitted that to say that such an instruction does not comport with sound judicial administration is hardly to add to the discussion. Surely sound judicial administration should endeavor at all times to bring about sound and defensible results. What has been hereinbefore set out demonstrates, it is submitted, that the giving of the instruction here advocated *is* promotive of sound and proper results.

It is to be noted, however, that in addition to making the general observation quoted the court also particularized, stating:

"A greater number of the courts are apparently of the view that the injection of the question of income tax liability would * * * give rise to more problems than it would solve."

Combs v. Chicago, St. P., M. & O. Ry. Co., supra.

If valid, this exception to such instruction is indeed weighty. It is, however, as can be shown, not well taken.

a. *Such an instruction subtracts from rather than adds to the problems of the jury in that it removes from possible consideration by the jury all federal income tax questions.*

To tell a jury that the dollars which a personal injury plaintiff may ultimately be paid are not income, are not the federal-income-tax-subject kind of dollar, is clear, forthright and final. It leaves no room for doubt. It is well designed to foreclose and forestall conjecture, discussion and debate on the problem. It will, it is believed, have that effect.

All of the opinions of American courts, thus far cited, refer to a plaintiff's personal injury recovery as *"exempt from"* federal income tax rather than simply *not income.* This is inexact. The difference is much more than a mere matter of semantics. The words "exempt from" tend to conjure up the picture of a taxpayer on one side of the table and an Internal Revenue Service agent on the other, the two of them earnestly debating whether dollars, otherwise tax subject, are subject to some exemption or other. With such connotations in mind it is not unnatural for a judge to feel that a jury is ill-suited for wrestling with such problems. But whereas the term "exempt from" is thus fuzzed up, the term "not-income" is both simple and definitive. Surely any juror, otherwise fit to be a juror, can grasp it as readily as can a trained lawyer.

Such an instruction should, therefore, describe the plaintiff's expected recovery as *not-income* rather than as possibly *tax exempt.* The otherwise impeccable instruction given by Judge Artl and quoted at the beginning of this article would, it is respectfully submitted, have been materially improved had it thus referred to plaintiff's anticipated recovery.

b. *Such an instruction would not warrant bringing into a case unrelated matters otherwise improper.*

By way of *dictum* the Supreme Court of Illinois in the *Hall* case, *supra,* says:

> "* * * if the defendant's argument is proper on the basis that it tells the jury what the law is then what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages * * *?"
>
> *Hall v. Chicago & N. W. Ry. Co., supra.*

This seems to say, in cryptic fashion, that when a trial court, by an instruction correctly stating the common law, *excludes* from a personal injury case the possibility of error by the jury, as to taxes, it thereby becomes proper to give an instruction, otherwise improper, to the effect that the jury *may add to* the amount of damages it would otherwise find, all the expenses incurred by the plaintiff in preparing for and conducting the trial.

The implication that the court's question calls for an affirmative answer is, it is submitted, a *non-sequitur,* as can be shown by a few simple questions:

1. Is it not true that "* * * to state that the expense of the trial * * *" incurred by the plaintiff "* * * is not provided for in the instruction concerning damages * * *" is, in effect, to tell the jury that it may add to whatever it would otherwise find for the plaintiff the amount of all his expenses in preparing for and conducting the trial? If not, how justify the inclusion of such language in an instruction on damages?
2. Is such inclusion of such language proper unless evidence of the precise nature and extent of such expense has previously been received?
3. Does a personal injury plaintiff have a substantive right to recover his counsel fees and all his other expenses in and about the trial?

It is believed that to ask these questions is to answer them. The third, however, warrants some discussion.

What expenses or "costs" a personal injury plaintiff can recover, are, it is believed, governed by a statute in every American jurisdiction. Only such of a successful litigant's expenses as provided in such statute can be recovered:

Stickney v. Goward, 161 Minn. 457, 201 N.W. 630, 39 A. L. R. 1216 (1925). It is right and proper that such should be the law.

The expenses voluntarily incurred, or committed for, by a plaintiff in a potentially large verdict personal injury case, are, in these days, substantial. For a jury to add to a contemplated six-figure verdict (1) counsel fees amounting to a sizeable percentage of the recovery, the cost of (2) scale models, (3) aerial and other photographs, (4) elaborate engineering exhibits, (5) expert medical and surgical testimony, and (6) other incidental expenses, might, in some cases, result in increasing the amount ultimately found by a very substantial increment. Both the range and the cost of such items are unpredictable. They are limited only by the ingenuity and imaginativeness of the plaintiff and his counsel.

To permit such matters to be litigated in personal injury trials *would* be to introduce, in the language of some of the cases cited and discussed herein, an "extraneous subject." It would certainly multiply the issues and extend the time required for such trials to an uncontrollable degree. To state such a possibility is to condemn it. The statutes which forestall its being done are therefore on sound ground.

c. *Being inherently proper the giving of such an instruction should not be left to the trial court's discretion.*

Although admitting that the *Dempsey* case does not thus equate these terms, the court in the *Combs* case says that to hold that such an instruction is *cautionary* is, in effect, to find it also *discretionary* with the trial court. The reasons the court had in mind for so holding are not spelled out but can, it is believed, thus be broken down:

1. Such an instruction correctly states the law and is proper;
2. It is, however, cautionary in nature, a circumstance which renders the giving of it of minor importance;
3. Thus relatively unimportant, it is within the discretion of the trial court to give or refuse it.

That the "cautionary" criticism will not bear analysis has, it is respectfully submitted, been hereinbefore demonstrated.

That the issues posed by the proposed instruction are not only important but critically important, is, it is believed, hereinbefore demonstrated. It is respectfully submitted that appellate courts should not abdicate their responsibility as to these issues.

Fortunately, in the greater majority of the forty-eight states the trial courts are still free to accord to such an instruction, when profferred, the acceptance it merits. It is therefore believed that continuing well-implemented efforts by defense counsel will, in time, bring about general use of this much needed instruction.

There remains, however, another important question within the purview of this paper.

II

Where personal injury plaintiffs offer detailed evidence as to past loss of earnings, or anticipated future earnings, or both, should defendant be permitted to offer evidence that such gross earnings are subject to federal income taxes and should juries be instructed to take account of such evidence in any findings they make based upon such loss of earnings?

In the *Combs* case, *supra,* the court rightly recognized that the type of instruction there involved and here supported in the first part of this paper focuses strictly upon the lump-sum payment which a jury is about to award a personal injury plaintiff, limits the jury to a consideration of such amount alone and tells the jury simply that it should add nothing to such amount because of supposed federal income tax liability, even though a component of such lump sum be impairment of future earning power. As to this latter subject the court held:

> "There is not involved in the present case the question as to whether in making an award for future impairment of earning capacity of a plaintiff there should be taken into consideration the taxes that would have been imposed upon his earnings if he had been able to continue his occupation or vocation. The Courts seem well agreed that the future tax liability is subject to too many variables to be a matter of consideration in an award for future impairment of earning capacity. See annotation to *Billingham v. Hughes,* English Court of Appeal (1949), 1 K. B. 643, 9 A.L.R. 2d 311. See also *Chicago & N. W. Ry. Co. v. Curl,* 8 Cir., 1949, 178 F. 2d 497, 502, and *Texas & N. O. R. Co. v. Pool,* Tex. Civ. App. 1953, 263 S.W. 2d 582."
>
> *Combs v. Chicago, St. P. & O. Ry. Co., Supra.*

The English case there cited was overruled by the Law Lords in their latest decision, above mentioned. In that case, *British Transport Comm. v. Gourley, supra,* the British Law Lords not only answered the question last stated in the affirmative but, in so doing, forthrightly and boldly approved a form of instruction much broader than any approved in any of the American cases heretofore cited in this paper. The holding of the majority of the Law Lords was best summarized by Lord Goddard who suggested the following instructions:

> "You know what the plaintiff was earning before the accident and what he had left to support himself and his family after tax was paid. You know his age. It is for you to consider for how long he would be likely to earn at the present rate. If he is a member of a partnership take into consideration his position in the firm at the time of the accident. If a junior partner, you may well think that his earnings would have increased as time goes on, while if a senior partner, they might well decrease as he ceases to give the same amount of time to the business of the firm. Remember that whatever he earned would be subject to tax, and that you will already have in mind when assessing his pre-accident income. No one can foresee whether tax will go up or down, and I advise you not to speculate on the subject but to deal with it as matters are at present. You cannot tell what his health would have been had he not been injured, nor what fortune good or bad he might have met with. You know he had, when he was injured, a spendable income of so much (adding if the plaintiff was in partnership, you have heard the provisions of his partnership deed providing for an alteration in the shares, and you may consider whether his injury may affect the earnings of the partnership). Taking all these matters into consideration, you will consider what it is fair that a man of this age should receive in re-

spect of the amount of disability which you find this accident has imposed on him, remembering also that what you give is given once and for all."

British Transport Comm. v. Gourley, supra.

The Law Lords apparently intend that juries shall be required to go into the various detailed considerations and processes there stated where plaintiffs rely upon detailed calculations of loss of earnings. The instruction thus approved complements but does not supplant the Artl instruction.

In a Connecticut case decided recently, the Supreme Court of Errors of that state, in a very lucid and forceful opinion, held:

"* * * It would be difficult to conceive of a more unjust, unrealistic or unfair rule than one which would lead a jury to base their allowance of reasonable compensation for the destruction of earning capacity on the hypothesis that no income taxes would be paid on net earnings. For all practical purposes, the only usable earnings are net earnings after payment of such taxes.

"It is true that in some jurisdictions, as pointed out by the plaintiff, evidence of income taxes has been held inadmissible, usually on the ground that it related to a factor too uncertain, conjectural or speculative in character to be of benefit in the assessment of damages for the permanent impairment or destruction of earning capacity. This was the rationale of the decision in *Stokes v. United States,* 144 F. 2d 82, 87, cited and stressed by the plaintiff. The case arose in the second circuit and is perhaps generally regarded as a leading case on the point. Its holding was followed in the eighth circuit in *Chicago & N. W. Ry. Co. v. Curl,* 178 F. 2d 497, 502. We are not impressed by the reasoning of these cases. The factor in question is no more uncertain, speculative or conjectural than many of the other factors which must be, and in this case were, submitted to the consideration of the jury under our rule as set forth in cases such as *Sims v. Smith,* 115 Conn. 279, 285, 161 A. 239. Our view is in gareement with that expressed in 2 Harper & James, Torts, §25.12. The offsetting factor of the probable income taxes on the probable net earnings should, in a proper case, be called to the attention of the jury in the same ways as the other offsetting factors mentioned in *Sims v. Smith, supra.*

"* * * The plaintiff claimed that a deduction of probable income taxes is no more proper in a fatal case than in a nonfatal case involving a total destruction of earning capacity. The short answer to this claim is that we have never held that such a deduction should not be made in such a non-fatal case."

Floyd v. Fruit Industries, 136 A. 2d 918, (December 3, 1957).

The well-regarded and recent textbook authority relied upon by the Connecticut court in its opinion just quoted reads in part as follows:

"* * * should the probable gross earnings, or estimated net income after taxes, be taken as the measure of recovery for loss of earnings? The argument for computing damages on estimated income after taxes is a clear one: this will measure the actual loss. If the plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost.

"Not many decisions explicity treat this question. Most of those that do consider it refuse to deduct taxes on the ground that future tax rates and the way they may affect this particular plaintiff are too speculative. * * *

"Even in this form the argument is weak. In the first place it has no proper application to damages for *past* losses. In measuring them the tax can be computed and should be deducted. Moreover future taxes are no more speculative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends of a dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as "death and taxes", the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence has been brought before them. It is noteworthy that the British House of Lords has recently held that

damages for past and prospective earnings should be based on estimated net income after taxes. *British Transport Comm. v. Gourley, supra.* * * *"

2 Harper & James, Torts, §25.14, p. 1330, § 25.12 (1956).

No attempt has been made to make this paper an encyclopedic discussion of the subject-matter. The need for such an article has been obviated by the learned and conscientious review of the decided cases found in the opinion in the *Combs* case, *supra,* and by Underwood, Damage Awards, Instructions and the Jury's Common Knowledge, 59 West Virginia Law Review 355 (1957). The views here espoused are, in general, supported by:

Chicago-Kent Law Review, Vol. 33, page 377;

15 *Ohio State Law Journal,* page 83;

Syracuse Law Review, Vol. 4, pages 350, 351 (1952-53);

32 *Texas Law Review,* pages 108, 110.

The careful student of these problems should also read Diehm, What Relation to Negligence Defense Cases Has Federal Income Tax Question, If Any?, 24 Insurance Counsel Journal 70 (1957). This writer provides a careful resume' of the different decisions, apparently favors such an instruction as supported in the first part of this paper, but is of a somewhat divided mind.

Summary

The reasoning of the courts which have condemned the type of instruction advocated in the first section of this paper stresses chiefly the problems of judicial administration which are envisaged. None of their opinions, for example, answers such meritorious questions as:

1. Does this instruction deny a plaintiff anything to which he is entitled? If so, what?

2. Does it grant a defendant anything to which he is not entitled? If so, what?

In fairness to these courts it should be recalled that none of the cases decided by them involved precisely the Artl instruction, amended as herein suggested. There are indications in some of these opinions that had the Artl instruction, so amended, been involved, the results would have been different.

The courts of last resort of thirty-nine of the American states have not yet been confronted with the question discussed in that part of this paper. The law has therefore not taken final shape. The proper solution of the problem is of great public interest.

To refuse to reveal to a jury the important item of substantive law involved in the instruction proposed at the beginning of this paper is to put blinders upon the "twelve good and lawful men" and women at a time when, in other respects, the trend of judicial decisions is to open up to juries an ever wider field of factual and legal information. No adequate reasons warrant such restrictive and regressive action.

The giving of this form of instruction will be promotive of sound and just results. It will simplify, clarify and shorten a jury's deliberation.

As to the question discussed in the latter portion of this paper, it is submitted that *British Transport Comm. v. Gourley, supra,* and *Floyd v. Fruit Industries, supra,* represent mileposts, the first in the law of England and the second in the law of the United States. They are so well grounded as to afford good reason to believe that they represent the law of the future.

Federal Tax Claims Again, or Devastation Revisited*

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THE CONFLICT between the government lien claims, notably tax lien claims and the interests of sureties was the subject of a careful survey previously published in the pages of this Journal.[1] Only the importance of the subject and the developments in the field since the time of that treatise, July 7, 1957, justify this article. Because the interest of the parties involved in these conflicts was so clearly arraigned in the previous discussion, no effort is made here to sketch out the historical background of these problems. What is said here is intended to do no more than supplement what has gone before.

Since July, 1957, the Supreme Court of the United States has disposed of *United States v. R. F. Ball Construction Co.,* 353 U.S. 956 and the later companion cases of *Commissioner v. Stern,* 357 U.S. 39 and *United States v. Bess,* 357 U.S. 51 (June 9, 1958). The decisions in these cases and the efforts of the lower courts to apply their effect in subsequent cases are of prime interest in light of the apparently increasing number of contests between the government and sureties over contract funds.

United States v. Ball Construction Company arose out of a situation in which the surety had bonded a painting job for a sub-contractor, Jacobs. When writing the bond, the subcontractor, Jacobs, agreed to assign to the surety all of the subcontract funds to secure the bond then being written as well as any other indebtedness which he might incur to the surety. Thereafter, a second bond was written by the surety for Jacobs. Loss was incurred by the surety under the second bond. In the meantime federal tax liens were filed against Jacobs, those liens preceding the loss incurred by the surety. Both government and surety made claim to the unexpended subcontract funds remaining under the first contract. The district court held that the surety was in effect a mortgagee under applicable Texas law. It is important to observe at this point that, at the time of the execution of the assignment, the surety was not bound to obligations other than those arising under the bond then being executed. The second bond was issued before the tax liens were filed and the surety then became bound for those additional obligations but in amounts which would be determined in the future.

The Supreme Court, in a *per curiam* decision, applied its "rule of choateness", and reversed the decision below without discussion. A vigorous minority opinion was filed in which four members of the court dissented from the *per curiam* decision. The dissenting opinion distinguished the application of the cases upon which the majority relied, i.e., *United States v. Security Trust & Savings Bank,* 340 U.S. 47, and *United States v. City of New Britain,* 347 U.S. 81, and insisted that the contractural arrangement between Jacobs and the surety was in legal effect a mortgage which antedated the filing of the federal tax lien. The dissenting judges concluded that the character of this security made it superior to the federal tax lien. The majority opinion recognized the mortgage character of the transaction accorded to the instrument by state law. The minority concluded that the mortgage was completely perfected as of its date, in all respects choate and valid between the parties and expressly made superior to the subsequent federal tax liens by the terms of paragraph 3672 (a) of the Internal Revenue Code of 1939.

If the effect of the *Ball* decision reached no further than to affect the rights of sureties under indemnifying agreements, it would cause enough discomfort. But the implication of the decision goes far be-

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yond the narrow issues which were decided. It throws doubt upon those cases in which mortgage holders may make optional advances. The commonly used forms of mortgage and deed of trust permit the secured party to advance taxes, to make necessary repairs and in general to take such steps as may be necessary to prevent impairment of the security. Whether or not such payments will become necessary or will be made at all is entirely speculative at the time the mortgage instrument is executed. The party secured is not compelled, at least by contract, to make the advances. They are within his judgment and option. To this extent the position of the party secured by such a mortgage instrument is less certain than the case of the surety in *Ball Construction Company* because there the surety was compelled to make payment by reason of its bond, although the amounts of its liability could not be established until later. In at least one recent case, *U. S. v. Lord,* 155 F. Supp. 105, it was held in a foreclosure proceeding that the party secured by the mortgage could not recover fire insurance premiums or tax redemption payments made by him.[3]

After *Ball* came the companion cases of *Commissioner v. Stern,* 357 U.S. 39 and *United States v. Bess,* 357 U.S. 51, decided on June 9, 1958. In the *Stern* case the estate of a deceased Kentucky taxpayer was subjected to a deficiency for taxes incurred prior to death. The estate was unable to pay the amount of the deficiency and the commissioner proceeded against the widow who had received substantial proceeds from life insurance policies. The cash surrender value of the life insurance at the time of the taxpayer's death was insufficient to pay the amount of the tax deficiency, although the total proceeds were greater than the amount of the assessment. The Supreme Court denied recovery of any part of the insurance policy proceeds. It was held that a Kentucky statute exempting the proceeds of life insurance policies in the hands of beneficiaries from the claims of creditors, except where premiums were paid in fraud of creditors, had the effect of barring the government's right to proceed against the beneficiaries as transferees. It is to be noted that no tax lien existed at the time of the death of the taxpayer.[3]

The companion case of *United States v. Bess* involved a situation in which the taxpayer had failed to pay taxes for several years before his death. As a consequence, a lien had resulted. Following the taxpayer's death the proceeds of the taxpayer's life insurance policies were paid to his widow and the government sought to recover from her the total amount of taxes owing by the taxpayer. The unpaid taxes substantially exceeded the cash surrender value of the policies, although they were less than the entire proceeds of the policies. Here the court permitted recovery of the cash surrender value of the policies. The court noted that by New Jersey law the taxpayer was entitled to the surrender value of the policies during his lifetime. That surrender value was consequently subject to the government's lien. While it was observed that the right to the surrender value terminated upon the death of the insured, it was pointed out that the surrender value also represented a fund in the hands of the insurer to which an additional amount must be added for payment when the policies matured by reason of death. It was concluded that the total payment in the hands of the beneficiary included an amount which sufficiently retained the character of "cash surrender value" to support a claim by the government to the amount in the hands of the widow. The court rejected any claim by the government to an amount greater than the cash surrender value.[4]

The *Bess* case is of importance and comfort because of its citation with approval of *Fidelity & Deposit Company of Maryland v. New York City Housing Authority,* 241 F. 2d 142. That case is cited as an illustration of the rule that the court must look to property rights created under state law. Aside from the importance of this case in its application to proceeds of life insurance policies, its tacit approval of the decision in *Fidelity*

[3]In addition to this the mortgage holder was obliged to pay local municipal taxes out of the amount awarded in satisfaction of the mortgage since the competitive federal lien claim enjoyed superiority over the municipal taxes, although it was subordinate to the recorded mortgage. This is the solution of the circular priority problem. *U. S. v. City of New Britain, supra.*

[3]There were three dissents to this decision.

[4]There were three dissents in this case.

& Deposit Company of Maryland v. New York City Housing Authority would appear to make its effect of considerable importance in the arena of contests between the government and the sureties.

The Court of Appeals of New York on June 30, 1958, affirmed the decision in *Aetna Casualty and Surety Company v. Horticultural Service, Inc.,* 158 N. Y. S. 2d 750. The construction contract in that case permitted the owner to withhold contract payments until furnishers of labor and material had been paid. The surety which had paid the labor and material bills pursuant to the terms of its bond was held to be subrogated to the rights of the owner. The holding was that the taxpayer-contractor could not collect the contract funds from the owner until the furnishers of labor and material had been paid and consequently the government's right to the funds could rise no higher than those of the taxpayer. The taxpayer's rights were created by the contract and were accordingly governed by state law rather than federal law. The federal lien for the unpaid taxes of the contractor failed in contest with the claim of the surety. The court of appeals relied upon *United States v. Bess* and *Fidelity & Deposit Company v. New York Housing Authority, supra.*

In re Fago Construction Corp., 162 F. Supp. 238 involved Miller Act bonds given by a surety for a government contractor. The surety had been obliged to advance funds to enable the contractor to complete its work. The contractor directed delivery of the contract payments to the surety. A progress payment in excess of $50,000 became due under the contract. The government, by way of offset, applied this payment in satisfaction of unpaid taxes owed by the contractor. The latter subsequently became bankrupt. In the bankruptcy proceeding, the surety claimed that it was subrogated to the tax claim paid through application of the contract progress payment and that consequently the assets of the bankrupt were subject to a preferred claim in its favor as subrogee. The court denied the surety's claim holding that the taxes were not an obligation of the bond and that since there had been no default under the contract, the current progress payments, in the hands of the government, were still the property of the contractor. As his property they were subject to application to his debts. This result is justified by the decision in *United States v. Munsey Trust Company,* 332 U.S. 234.

On appeal in the *Fago* case, under the title of *Massachusetts Bonding and Insurance Company v. New York,* 259 F. 2d 33, the decision of the district court with respect to the offset contention was sustained.[8]

The district court, on remand of *Fidelity & Deposit Company v. New York City Housing Authority,*[9] 157 F. Supp. 87, held that the law of New York gives the surety which has paid labor and material furnishers an equitable lien on the unexpended contract fund. This conclusion is based upon the authority of *United States Fidelity & Guaranty Company v. Triborough Bridge Authority,* 297 N.Y. 31. The court expressly recognized this conclusion to be contrary to the holding

[8]The court then took up an additional claim of the surety which had not been decided previously. It appeared that the bankrupt had wrongfully obtained one progress payment by revoking letters which had authorized its delivery to the surety. Part of this payment had been used by the bankrupt to purchase real estate in the name of a subsidiary corporation. The amount so used had been recovered by the trustee in bankruptcy. The surety made claim to this fund and the court sustained the claim. The court held that where the surety had advanced funds to pay labor and material bills, it was entitled to the contract payments in the hands of the contractor, or, as here, in the hands of the trustee in bankruptcy of the contractor. This was upon principles of equity. It was concluded that the absence of a formal default in the performance of the contract did not lessen the equitable rights of the surety and that the action of the latter in advancing substantial sums to enable the contractor to continue the performance of the work put it in the same position as if a formal default had been declared. It was held on the authority of *United States Fidelity & Guaranty Co. v. Triborough Bridge Authority,* 297 N.Y. 31, that the surety was equitably entitled to the proceeds of the recovery which the trustee had effected from the subsidiary corporation. The result which obtained here is particularly interesting since the court recognized the equitable interests of a surety which had paid labor and material bills and enforced that interest against the contract funds even though the Supreme Court in *United States v. Munsey Trust Company,* 332 U. S. 234, held that payment of labor and material furnishers by the surety did not give rise to rights of subrogation on the stated ground that labor and material furnishers had no claims against the government or the fund in the government's hands, to which the surety could be subrogated. This case tacitly recognizes a claim by labor and material furnishers against the fund even though such a claim might not exist against the owner.

[9]The prior appeal (241 F.2d 142) was discussed in Mr. Cross' article, Journal issue of October, 1957.

in *United States v. Munsey Trust Company*. However, the latter case can be no more than a statement of federal law and not a statement of state law.

A quite recent case of considerable importance and interest in the mechanic's lien field is *United States v. Durham Lumber Company,* 257 F. 2d 570. Here subcontractors under a construction contract made claim under the North Carolina mechanic's lien law. Under the North Carolina lien law a subcontractor is entitled to a lien upon the property of the owner. That lien is preferred to lien arising in favor of the general contractor. The general contractor, before receiving any payment from the owner, is required to file with the owner a statement of all sums due to subcontractors and the owner is directed to pay such sums directly to the subcontractors rather than to the general contractor. When a subcontractor gives notice, a lien immediately arises in his favor and no payment thereafter to the general contractor is a credit on or a discharge of the lien. The lien right itself is extinguished in six months if the subcontractor does not commence an action to enforce it. However, the requirement that the owner make payment to the subcontractor in preference to the general contractor remains in effect and the subcontractor may maintain an action against the owner at any time within the general period of limitations.

The Court of Appeals for the Fourth Circuit held that the question for decision was one of contract right and that it must be determined by state law. It was conceded that the lien of the government for taxes owing by the general contractor applied to all of the property of the general contractor, but the effect of that lien could not supersede the rights of subcontractors which were given them by statute and which ran against the owner. The court, in pointing out that the claims were against the owner and that by statute the owner could take credit for the amount paid to the subcontractors thus reducing the value of the claim of the general contractor said:

> "That is a consequence of the nature of the rights as created and limited by the statutes, but it does not force the subcontractor to look to the assets of the general contractor, rather than to those of the owner, for satisfaction of his claim. Nor does it permit us to deny enforcement of the subcontractors' statutory rights against solvent owners. At the most, it can mean only that, except to the extent the claim of the general contractor exceeds the aggregate of the claims of the subcontractors, the general contractor has no right which is subject to seizure under the tax lien."

The opinion cites *Fidelity & Deposit Company v. New York Housing Authority* to support its conclusion and notes that the Court of Appeals of New York in *Aquilino v. United States,* 3 N.Y. 2d 511, had apparently failed to accord the decision of *Fidelity & Deposit Company, supra,* the weight to which it was entitled particulrly in light of the subsequent citation of that case in *United States v. Bess.*

While *Durham Lumber* results from a careful reading of the North Carolina mechanic's lien statute, it would appear that practically the same result would follow from a similar reading of any mechanic's lien statute. These statutes almost invariably accord subcontractors a right to the contract funds which is superior to the right of the general contractor. In addition they permit enforcement of those rights against the property upon which the improvement has been placed. Consequently it would seem that the contractor's right to receive the contract fund could not mature or become enforceable as long as there were valid competitive mechanics' lien claims. Or, stated another way, the contractor's right never becomes choate or validly enforceable against the competing lien rights of the subcontractors. While it is true that the right of the United States under the tax lien is choate and perfect, the asset to which it attaches, the general contractor's claim against the owner, is neither choate nor perfect and is not enforceable. It would seem inescapably to follow that the contractor's right could not be improved and his position enhanced simply because that right had become subjected to the lien of the government. While *Durham Lumber* is distinguishable from *U. S. v. King's County Iron Works,* 224 F. 2d 232, *U. S. v. White Bear Brewing Company,* 350 U.S. 1010, and other mechanic's lien cases, the force of its reasoning seems to be in conflict with those decisions nor do those decisions compare

favorably either in reason or logic with the result reached in *Durham Lumber.*[7]

The case of *Aquilino v. United States,* 3 N.Y. 2d 511,[8] involved a taxpayer contractor who had entered into a construction contract with an owner for the remodeling of property. Mechanics' liens had been filed by furnishers of labor and material but not before the United States had filed a lien for unpaid taxes. Following *U. S. v. King's County Iron Works,* and *U. S. v. White Bear Brewing Company,* the court of appeals held that unrecorded and unperfected mechanics' liens were subordinate to the federal tax claims. The proceeds of the building contract were awarded to the federal government. It is difficult to see how this conclusion can be sustained in light of the decision in *Fidelity & Deposit Company v. New York Housing Authority* as is pointed out in *Durham Lumber Company.* It would seem more logical to conclude that the existence of mechanics' liens brought about a "no debt" result. The lien of the government should not attach to more than the right of the contractor and that right is clearly subordinate to the mechanics' lien claims.

An exhaustive discussion of this entire subject is found in the opinion of the court in *Wolverine Insurance Company v. Philips,* 165 F. Supp. 335. That decision reviews the rights of the surety through the application of equitable principals. It then discusses the "no debt" doctrine where the contractor, because of his breach of contract, either in performance or failing to pay labor and material bills, loses his right to enforce payment under the contract. The surety, after having responded to the obligation of its bond, becomes subrogated and acquires the right of the owner either to withhold payment to the general contractor because of the breach committed by the latter or the right of the owner to pay material and labor furnishers direct, if the terms of the contract so permit.

It is apparent from the cases decided in the last fifteen months that the problems in this field are by no means settled. The courts have shown a determination to struggle against the inequities and injustices which result from an application of the so-called "choateness" doctrine. The "choateness" doctrine is now being resisted with some degree of success on the basis of the "no debt" theory. It would seem that the "no debt" reasoning is unassailable but on the other hand it must be remembered that twenty years ago it would have been difficult to believe that claims of third parties against taxpayers could have been accorded the drastic treatment which intervening years has seen them receive. The American Bar Association, through its recently appointed Committee on Federal Liens,[9] has undertaken to study this entire area with a view to proposing legislation which would clarify the conflicts now multiplying in number and correct the inequities at present existing.

[7]On November 10, 1958 the Supreme Court reversed a decision of the Supreme Court of Florida which subordinated a federal tax lien to mechanic's liens. *United States v. Hulley,* 79 S. Ct. 117. This was done in a *per curiam* opinion which cited the court's previous decisions. The opinion of the Supreme Court of Florida was also *per curiam,* 102 So. 2d 599, and cited an earlier case, *United States v. Griffin-Moore Lumber Co.,* 62 So. 2d 589. The latter case interprets the Florida mechanic's lien law as giving a right against the property. This development casts doubt on the ultimate outcome of the doctrine of *Durham Lumber Co.*

[8]At this writing a petition for certiorari is pending in the Supreme Court.

[9]This committee filed an extensive report surveying the problems which have been troublesome generally. The report, presented to the House of Delegates of the Association at its August, 1958 meeting, may be obtainable from the American Bar Association, 1155 E. 60th Street, Chicago 37, Illinois.

Factors To Be Considered In Determining A Motion To Transfer Under 28 U.S.C. 1404(a)

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SECTION 1404(a) of Title 28, U.S.C., provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Under this section two basic problems are presented. The first concerns the power of the court to transfer and arises from the phrases "any civil action"[1] and "where It might have been brought."[2] These phrases raise such subsidiary questions as: What is a civil action? Where could a particular civil action be brought? Assuming the power, the second question concerns the criteria to be applied by the court in determining whether its power is or is not to be exercised—i.e., whether or not a given case is or is not to be transferred.[3]

This article will not consider the first problem.[4] It will assume that the power exists (that the transfer of a civil action to a jurisdiction in which it could have been brought is sought) and that the only question before the court is whether or not a given case is or is not to be transferred.[5]

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[1]This phrase has been given a wide interpretation. See e.g., *United States v. Swift & Co.*, 158 F. Supp. 551 (D. D.C. 1958); Note, 64 Harv. L. Rev. 1347, 1353 (1951).

[2]Most of the cases have considered two problems: (1) May a transfer be granted to a district where the defendant was not amenable to process? (2) May a transfer be granted to a district where venue was improper? These problems have primarily arisen when a defendant attempts to transfer to such a district, "waiving" his objection to venue or service of process. Both problems may also arise if the plaintiff seeks to transfer and the defendant refuses to consent to the transfer and waive his objections to service or venue. For full discussion see Note, 44 Cal. L. Rev. 792 (1956); Kaufman, Further Observations on Transfers Under Section 1404(a), 56 Col. L. Rev. 1, 13 (1956).

Another problem, considered in one case, is whether transfer can be granted to a district in which plaintiff had no power or status to sue, e.g., may a suit by a domiciliary personal representative be transferred to a district court sitting in a state whose law prohibits suit by a foreign personal representative? It was held that transfer was not possible. *Felchlin v. American Smelting & Refining Co.*, 136 F. Supp. 577 (S.D. Cal. 1955).

Another possible problem which does not seem to have been considered in any case is the question of the time to which the phrase "might have been brought" refers. At least three possibilities exist: (1) The time of the accrual of the cause of action. (2) The time suit was filed. (3) The time the motion to transfer is filed or heard.

[3]Related to both questions is the question of the scope of review of a transfer order by an appellate court. Since such an order is interlocutory, it seems quite clear that it is not appealable. 28 U.S.C. §§ 1291, 1292; *Crummer Co. v. DuPont*, 196 F. 2d 468 (5 Cir. 1952), *cert. denied* 344 U. S. 851. Numerous cases have dealt with the power of an appellate court to issue a writ of mandamus. *Great Northern Ry. v. Hyde*, 238 F. 2d 852 (8 Cir. 1956); same case, 245 F. 2d 537 (8 Cir. 1957); *Lemon v. Druffel*, 253 F. 2d 680 (6 Cir. 1958). Although there is agreement that actions by a trial judge within the scope of his discretion will not be disturbed, the exact extent of power to review such questions as an abuse of discretion or a question of where an action "might have been brought" is unclear, the different circuits being in conflict. See Kaufman, Further Observations on Transfers Under Section 1404(a), 56 Col. L. Rev. 1 (1956); Note, 43 Cal. L. Rev. 841 (1955); Note, 8 Stan. L. Rev. 388 (1956).

[4]Also not discussed herein is the taking of a nonsuit or a dismissal without prejudice by plaintiff after defendant has moved for transfer under 1404(a). Generally, this is permissible if the case has proceeded little beyond the complaint stage. *Littman v. Bache & Co.*, 252 F. 2d 479 (2 Cir. 1958); *Southern Ry. v. Chapman*, 235 F. 2d 43 (4 Cir. 1956); *Toulmin v. Industrial Metals Protectives*, 135 F. Supp. 925 (D. Del. 1955).

[5]If it is assumed that the law of the transferee jurisdiction will apply after transfer, the fact that that law is different from the law of the transferor jurisdiction might influence a decision to transfer. See p. 127, *infra*. However, in certain cases, it might not be proper for the law of the transferee jurisdiction to apply, at least not without certain limitations. For a comprehensive discussion of the conflict of laws problem involved, see Currie, Change of Venue and the Conflict of Laws, 22 Chi. L. Rev. 405 (1955), or the abridged version of this article, Currie, The Erie Doctrine and Transfer of Civil Actions, 17 F.R.D. 358 (1955).

APPROACH

At the outset it is necessary to determine the proper approach that should be made by a district court to a motion for transfer under 1404(a). Before the passage of 1404(a) the doctrine of *forum non conveniens* was slowly being assimilated into the common law of several American jurisdictions.[6] This doctrine provides, in essence, that a court has the discretionary power to dismiss a case, even though the case is properly before the court, if it would be very much more convenient to try it in another forum. The result, of course, is that if plaintiff wishes to pursue his cause of action, he must begin again in another forum.

In *Gulf Oil Corp. v. Gilbert*[7] the Supreme Court held in 1947 that district courts might exercise their discretion to dismiss actions pursuant to the doctrine of *forum non conveniens*. Factors to be considered were listed:

> "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[8]

The following year 1404(a) was enacted. The entire judicial reform of which this section is a part had been under consideration for some time, and thus 1404(a) could not have been a direct response to the *Gilbert* decision.[9] However, it is clearly related to that doctrine,[10] and the courts have taken the criteria listed in *Gilbert* as a guide to the factors which should be considered.[11]

Since 1404(a) does not specify the extent of the "convenience," one of the first questions to arise was whether or not 1404(a) merely codified the doctrine of *forum non conveniens*, which required an extremely strong showing by the defendant. Although some courts, including the Second Circuit, held that 1404(a) was such a codification,[12] the majority of courts and commentators indicated that transfer should be granted on a much lesser showing of inconvenience than that required to dismiss because of *forum non conveniens*.[13]

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[6]Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1 (1929).

[7]330 U. S. 501 91 L. Ed. 1055 (1947).

[8]330 U. S. at 508, 509.

[9]See *Ex parte Collett*, 337 U. S. 55, 93 L. Ed. 1207 (1947); Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908 (1947).

[10]41 Cornell L.Q. 311 (1956).

[11]Kaufman, Obervations on Transfers Under Section 1404(a), 10 F.R.D. 595, 605 (1951).

[12]*Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2 Cir. 1950).

[13]*All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3 Cir. 1952); *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. 2d 360 (4 Cir. 1949); *Amalgamated Ass'n of Street Railway Employees v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (5 Cir. 1949); Note, 64 Harv. L. Rev. 1347 (1951). See *Ex parte Collett*, 337 U. S. 55 (1949) [F.E.L.A.], and *United States v. National City Lines*, 337 U.S. 78 (1949) [anti-trust], in which the broader scope of § 1404(a) was indicated by its application to types of actions which were not subject to dismissal under the doctrine of *forum non conveniens*.

This conflict in approach was resolved in 1955 by the Supreme Court in *Norwood v. Kirkpatrick.*[14] The court noted the far more gentle effect of transfer under 1404 (a), since the case is not dismissed but merely transferred, and found that the Congress meant to revise the prior law to " 'grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.' "[15]

In view of the *Norwood* decision, it would seem no longer necessary to find that the balance must be strongly in favor of the defendant before transfer is granted. Thus in one of the first cases relying upon *Norwood,* it was stated:

> "Since the necessity for dismissal was eliminated, the burden which a defendant had to bear in order to transfer was accordingly eased."[16]

However, several cases still give surprisingly strong weight to plaintiff's choice of forum. These cases may be explained on the ground that *Norwood* was not called to the court's attention, reliance being placed on *Gulf Oil Corp. v. Gilbert.*[17] In any event, the plaintiff's choice of forum seems to remain a substantial factor.

The result of the *Norwood* case is that 1404 (a) gives the district judges a broader discretion to grant transfers than they could exercise under the doctrine of *forum non conveniens.* Thus the correct approach had been made by the courts which had held that defendants are not required to produce an overwhelming balance of favoring factors, greatly preponderating over those of plaintiff. Thus under *Norwood,* the defendant's mandatory margin for victory need no longer be an overwhelming one.

Many of the cases hereinafter cited followed the incorrect view of the relationship between 1404 (a) and the doctrine of *forum non conveniens.* Yet in many of these cases transfer was granted. The criteria favoring transfer set forth in those cases as well as in *Gulf Oil Corp. v. Gilbert* will be considered since such factors are even more applicable in the correct approach to transfer under 1404 (a).

STANDARDS TO BE APPLIED[18]

Section 1404 (a) provides for a trinity of standards or tests to be applied in determining whether or not a given case is to be transferred, namely:

1. Convenience of parties,
2. Convenience of witnesses, and
3. Interest of justice.[19]

There is a definite correlation between each standard. "This 'interest of justice' may be a reason separate and distinct from the convenience of parties and witnesses as well as a necessary and resultant factor from such convenience."[20]

The "interest of justice" test is of paramount importance.[21] Thus, even though the convenience of the parties would best be served by not transferring, transfer has

[14]349 U.S. 29, 99 L.Ed. 789 (1955). The several notes upon *Norwood v. Kirkpatrick* include:
41 Cornell L.Q. 311 (1956).
18 Ga. B.J. 213 (1955).
17 U. Pitt. L. Rev. 108 (1955).
54 Mich. L. Rev. 285 (1955).

[15]349 U.S. at 32. Query: Since transfer under 1404 (a) is to be allowed on more liberal terms than dismissal under forum non conveniens, does *forum non conveniens* still exist as a separate doctrine in the area in which 1404 (a) might apply? Affirmative: *Gross v. Owen,* 221 F. 2d 94 (D.C. Cir. 1955); Note, 24 Geo. Wash. L. Rev. 208 (1955); 60 Yale L.J. 537 (1951). Negative: *Collins v. American Automobile Ins. Co.,* 230 F. 2d 416 (2 Cir. 1956); *Willis v. Weil Pump Co.,* 222 F. 2d 261 (2 Cir. 1955).
The doctrine of *forum non conveniens* would seem clearly to still apply when the more convenient forum is outside the United States, since there can be no question of the applicability of 1404 (a). *Vanity Fair Mills v. T. Eaton Co.,* 234 F. 2d 633 (2 Cir. 1956); *Sociedade Brasileria v. S. S. Punta Del Esta,* 135 F. Supp. 394 (D. N.J. 1955); *Harrison v. United Fruit Co.,* 141 F. Supp. 35 (S.D. N.Y. 1956).

[16]*Miracle Stretch Underwear Corp. v. Alba Hosiery Mills,* 136 F. Supp. 508, 510 (D. Del. 1955).

[17]See, e.g., *Velez v. Lykes Bros. Steamship Co.,* 142 F. Supp. 612 (S.D. N.Y. 1956).

[18]Annotation: Construction and Application of Forum Non Conveniens Provision of the New Judicial Code [§ 1404 (a)], 99 L.Ed. 799, 829 (§ 17 Determinative Factors) (1955).

[19]*Chicago, Rock Island & Pac. R. R. v. Igoe,* 220 F. 2d 299 (7 Cir. 1955); *Dairy Industries Supply Ass'n v. La Buy,* 207 F. 2d 554 (7 Cir. 1953); *General Felt Products Co. v. Allen Industries, Inc.,* 120 F. Supp. 491 (D. Del. 1954); *United States v. E. I. du Pont de Nemours & Co.,* 87 F. Supp. 962 (N.D. Ill. 1950).

[20]*Webster-Chicago Corp. v. Minneapolis-Honeywell Regulator Co.,* 99 F. Supp. 503, 506 (D. Del. 1951).

[21]*Chicago, Rock Island & Pac. R. R. v. Igoe,* 220 F. 2d 299 (7 Cir. 1955); *United States v. American Linen Supply Co.,* 134 F. Supp. 21 (E.D. Wis. 1955); *Mason v. Chicago, Rock Island & Pac. R. R.,* 96 F. Supp. 361 (W.D. Mo., 1951); *Greve v. Gibraltar Enterprises, Inc.,* 85 F. Supp. 410 (D. N.M., 1949); *Metropolitan Life Ins. Co. v. Potter Bank & Trust Co.,* 135 F. Supp. 645 (W.D. Pa. 1955).

been ordered for the convenience of witnesses and in the interest of justice.[22]

In determining whether or not a given case should be transferred the district judge must use his sound discretion, having in mind the three standards. The decision to transfer or not to transfer must be based on all relevant factors and a balancing of the conflicting interests.

> "One further misconception of §1404(a) by plaintiff requires correction—the belief no transfer will occur unless the new forum is fully as convenient to one litigant as to the other. §1404(a) would not beget offspring if it awaited such a perfect mating of conveniences. Necessarily, the choice of forum is under the statute a relative one. The goal is to select that forum in which justice can be had, and in which inconveniences of all parties litigant and their witnesses may arrive at an irreducible minimum."[23]

This necessity of arriving at a balance of convenience has been strongly put:

> "I agree that when the section speaks of the convenience 'of parties and witnesses,' it means that the convenience of both sides must be examined. But I know of no way of applying the requirement to a particular situation than by viewing the facts from both standpoints and giving preference to those which, in the court's opinion, preponderate to *such an extent as to make the choice in the interest* of justice. Unless the right to choose between conflicting facts or assertions exists, the court could never determine a motion under this section *on the facts*. For if the mere assertion by the Government of its own convenience and the convenience of its witnesses were sufficient to stay action, we would be confronted with a power to paralyze judicial discretion, beside which the devastating effect of the historic liberum veto ('Nie Pozwalan'—'I don't permit') of the Polish nobles in their Diet (1572-1697) would dim into insignificance."[24]

CONVENIENCE OF PARTIES

No detailed analysis will be made of the various cases in which it has been held that the convenience of parties will or will not be served by a transfer. This is a question of fact in each case and should be developed fully.[25]

The forum in which prompt trial may be had may be a factor in determining where the convenience of the parties will be served.[26]

The place where a party's books, records, and documents concerning the cause of action are located is of some importance in determining a party's convenience. In many cases transfer has been granted to the place where the necessary books, records, and documents were located.[27]

However, when the witnesses were located in the transferor forum, the trial judge's denial of transfer was affirmed since "the District Court could have believed it was easier to transport documents than witnesses."[28] One defendant eliminated plaintiff's objection based on the cost of travel by offering to provide transportation to the transferee forum for plaintiff's counsel and expert witness.[29] The fact that books, documents and records are in various places and will have to be brought to some one place for trial minimizes the inconvenience of any one forum.[30]

The convenience of parties will be served by having related actions tried in the same tribunal as counsel would not have to divide their time between two different courts.[31]

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[22] *Chicago, Rock Island & Pac. R. R. v. Igoe, supra,* note 21; *Henderson v. American Airlines, Inc.,* 91 F. Supp. 191 (S.D. N.Y. 1950).

[23] *General Felt Products Co. v. Allen Industries, Inc.,* 120 F. Supp. 491, 493, 494 (D. Del. 1954).

[24] *United States v. National City Lines, Inc.,* 80 F. Supp. 734, 744 (S.D. Cal. 1948), affirmed 337 U.S. 78 (1949).

[25] See *United States v. Swift & Co.,* 158 F. Supp. 551 (D. D.C. 1958), for an example of the extensive and detailed showing which may be necessary to demonstrate how the convenience of the parties would be best served by transfer.

[26] *Fannin v. Jones,* 229 F. 2d 368 (6 Cir. 1956).

[27] *Johnson v. Baker,* 81 F. Supp. 563 (S.D. N.Y. 1948); *United States v. E. I. du Pont de Nemours & Co.,* 83 F. Supp. 233 (D.D.C. 1949); *Cinema Amusements, Inc. v. Loew's, Inc.,* 85 F. Supp. 319 (D. Del. 1949); *Greve v. Gibraltar Enterprises, Inc.,* 85 F. Supp. 410 (D. N.M. 1949); *Magnetic Engineering & Mfg. Co. v. Dings Magnetic Separator Co.,* 86 F. Supp. 13 (S.D. N.Y. 1949); modified on other grounds 178 F. 2d 866 (1950); *United States v. Swift & Co.,* 158 F. Supp. 551 (D. D.C. 1958).

[28] *American Pacific Dairy Products v. Siciliano,* 235 F. 2d 74, 78 (9 Cir. 1956).

[29] *Nocona Leather Goods Co. v. A. G. Spalding & Bros., Inc.,* 159 F. Supp. 269 (D. Del. 1958).

[30] *Ferguson v. Ford Motor Co.,* 89 F. Supp. 45 (S.D. N.Y. 1950).

[31] *Aircraft Marine Products, Inc. v. Burndy Eng. Co.,* 96 F. Supp. 588 (S.D. Cal. 1951).

CONVENIENCE OF WITNESSES

This is one of the statutory standards which must be considered. No detailed analysis will be made of the various cases in which it has been held that the convenience of witnesses will or will not be served by a transfer. This is a question of fact in each case and should be developed fully.[32]

The language of the court in *Hansen v. Nash-Finch Co.*[33] is quite pertinent, however, on the matters to be considered in this connection. A suit for personal injuries was filed in Minnesota. Defendant moved to transfer to North Dakota. All witnesses except two doctors lived in North Dakota. These doctors lived in New York. The court said:

> "Witnesses coming from Minot to Minneapolis would have the problem of hotel accommodations, the waiting period usually involved before the case is called for trial, the travel and subsistence expense, and the general inconvenience to which all witnesses are subjected whenever they are called away from their homes and work. Undoubtedly, the attendance of some of the witnesses would not be required. But it is fair to assume that a substantial number of persons would be required to leave their homes in Minot and travel the 485 miles to Minneapolis if this case were retained here.
>
> "Plaintiff earnestly contends, however, that the convenience to the doctors in New York and to himself in having the case tried in Minneapolis outweighs the inconvenience which may inure to the other witnesses. The inconvenience in making connections with the plane service to Minot from Minneapolis is emphasized. But the showing indicates that there is daily plane service to Minot from Minneapolis, and in view of the number of planes operating between New York and Minneapolis, there should be no substantial delay in making connections with a plane to Minot upon arrival in Minneapolis from New York."[34]

However, when the question is to which of two districts transfer should be granted, the question of which of two locations has better transportation connections may become quite relevant.[35]

The residence of expert witnesses cannot be considered as controlling or even of great importance in determining convenience.[36] "This may be because such witnesses are usually selected because of their reputation and special knowledge and without regard to their residences and are presumably well compensated for their attendance, labor and inconvenience, if any."[37] However, "while the Courts need not be too solicitous of [the] convenience [of expert witnesses]," in cases requiring a great number of such witnesses, their convenience is of some weight.[38]

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[32]It is agreed that with respect to "convenience of witnesses" the defendant must show the names and addresses of witnesses, must make a general statement as to what their testimony will cover, must show that these witnesses will be called for trial, and that emphasis must be on the above rather than the mere number of witnesses. *General Portland Cement Co. v. Perry*, 204 F. 2d 316 (7 Cir. 1953); *Strypek v. Schreyer*, 118 F. Supp. 918 (S.D. N.Y. 1954); *Savage v. Kaiser Motors Corp.*, 116 F. Supp. 433 (D. Minn. 1953); *Johnson v. Harris*, 112 F. Supp. 338 (E.D. Tenn. 1953); *Jenkins v. Wilson Freight Forwarding Co.*, 104 F. Supp. 422 (S.D. N.Y. 1952); *United States v. Gerber*, 86 F. Supp. 175 (second case) (E.D. Pa. 1949); *Chicago, Rock Island & Pac. R. R. v. Hugh Breeding, Inc.*, 232 F. 2d 584 (10 Cir. 1956) [same case on remand; transfer affirmed on stronger showing. 247 F. 2d 217 (10 Cir. 1957)]; *National Tea Co. v. The Marseille*, 142 F. Supp. 415 (S.D. N.Y. 1956); *McKinney v. Southern Pac. Co.*, 147 F. Supp. 954 (S.D. Texas 1957); *Ferment-Acid Corp. v. Miles Laboratories*, 153 F. Supp. 19 (S.D. N.Y. 1957); *National Steel Corp. v. Maryland Cas. Co.*, 18 F.R.D. 166 (W.D. Pa. 1955); *Peyser v. General Motors Corp.*, 158 F. Supp. 526 (S.D. N.Y. 1958); *Morgan v. Illinois Cent. R. R.*, 161 F. Supp. 119 (S.D. Texas 1958).

However, where there is no indicated convenience to plaintiff in having trial in the district in which he brought the action, defendant's showing of greater convenience through transfer need not be so great. *Hill v. Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956).

[33]89 F. Supp. 108 (D. Minn. 1950).

[34]*Id.* at 109.

[35]*Clayton v. Swift & Co.*, 137 F. Supp. 219 (W.D. N.C. 1956), mandamus denied sub nom. *Clayton v. Warlick*, 232 F. 2d 699 (4 Cir. 1956) [Chicago compared with Milwaukee].

[36]*Webster-Chicago Corp. v. Minneapolis-Honeywell Regulator Co.*, 99 F. Supp. 503 (D. Del. 1951); *Magnetic Engineering & Mfg. Co. v. Dings Magnetic Separator Co.*, 86 F. Supp. 13 (S.D. N.Y. 1949); modified on other grounds 178 F. 2d 866 (1950); *Aircraft Marine Products, Inc. v. Burndy Engineering Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *Johnson v. Smith Meal Co.*, 160 F. Supp. 208 (E.D. N.Y. 1958).

[37]*Webster-Chicago Corp. v. Minneapolis-Honeywell Regulator Co., supra*, note 36, at 505.

[38]*Pharma-Craft Corp. v. F. W. Woolworth Co.*, 144 F. Supp. 298, 308 (M.D. Ga. 1956).

INTEREST OF JUSTICE[39]

Various factors have been discussed by the courts in considering whether or not a given case should or should not be transferred. Many of the factors overlap and are thus complementary to each other. No one factor is controlling. The factors will be considered separately although it is the composite of all the factors that ultimately controls.

Selection of Forum by Plaintiff:[40]

Some importance is attached to the selection of a forum by plaintiff. The amount of weight to be given to the factor was, as has been seen in the discussion under APPROACH, *supra*, the subject of two divergent views. The opinion of the Supreme Court in the *Norwood* case adopted the view giving the least weight to this factor, although it must still be considered.[41] Plaintiff's choice will be given very strong weight if he has chosen to sue in the district of defendant's residence.[42]

The importance of this factor depends, in part, upon the contact between the forum and the cause of action stated. This is best illustrated by the Seventh Circuit in *Chicago, Rock Island & Pac. R.R. v. Igoe*,[43] where, in ordering a district judge to transfer a case, it said:

> "We agree with the statement of the court in Josephson v. McGuire, D.C., 121 F. Supp. 83, 84: 'A large measure of deference is due to the plaintiff's freedom to select his own forum. Yet this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff * * *.' In this case there is no controverted question which depends on any event occurring in the Northern District of Illinois. Both parties must rely upon evidence of events entirely removed from that District."[44]

Thus when the facts clearly indicate that plaintiff has been "forum shopping," his choice of forum will be given no weight whatsoever.[45]

Plaintiff's Residence:[46]

Whether plaintiff is or is not a resident of the forum in which suit is brought is a factor to be considered in determining whether or not transfer will be granted.[47] Although this might seem at first to be merely a matter of convenience for the plaintiff, there seems to be an additional element of interest of justice in having trial where the plaintiff resides. Thus Mr. Justice Clark, in speaking of the doctrine of *forum non conveniens* in his dissent in *Norwood*, states:

> "Without detailing all the facts here involved, we note that one of the plaintiffs resided in the district where this suit was brought. Under the usual forum non conveniens approach, this would virtually suffice, in and of itself, to preclude a refusal to retain the case for trial."[48]

Even though 1404(a) is more than a

[39]For brief surveys of the criteria to be applied together for general analysis of 1404(a), see Note, The Scope, Effect and Review of Orders Under Section 1404(a), 8 Stan. L. Rev. 388, 392 (1956); Kaufman, Observations on Transfers Under Section 1404(a), 10 F.R.D. 595, 605 (1951).

[40]Related to this problem is the question of whether or not plaintiff may seek transfer under 1404(a). See Note, 64 Harv. L. Rev. 1347, 1348 (1951); *Broussard v. The Jersbek*, 140 F. Supp. 851 (S.D. N.Y. 1956); *Anschell v. Sackheim*, 145 F. Supp. 447 (D. N.J. 1956).

[41]*National Tea Co. v. The Marseille*, 142 F. Supp. 415 (S.D. N.Y. 1956); *Velez v. Lykes Bros. Steamship Co.*, 142 F. Supp. 612 (S.D. N.Y. 1956); *Miracle Stretch Underwear Corp. v. Alba Hosiery Mills*, 136 F. Supp. 508 (D. Del. 1955); *Hohler v. Pennsylvania R. R.*, 140 F. Supp. 487 (W. D. Pa. 1956); [Special weight should be given to plaintiffs choice in FELA cases.] *Miller v. National Broadcasting Co.*, 143 F. Supp. 78 (D. Del. 1956); *Anschell v. Sackheim, supra*, note 40; *Buchanan v. New York C. R. R.*, 148 F. Supp. 732, (E.D. Pa. 1957); *Chicopee Mfg. Corp. v. Kendall Co.*, 154 F. Supp. 248 (W.D. S.C. 1957); *Sokolowska v. National Airlines*, 154 F. Supp. 376 (S.D. N.Y. 1954); *Blau v. Lamb*, 20 F.R.D. 411 (S.D. N.Y. 1957); *Rubin v General Tire & Rubber Co.*, 18 F.R.D. 51 (S.D. N.Y. 1955); *Peyser v. General Motors Corp.*, 158 F. Supp. 526 (S.D. N.Y. 1958).

[42]*Daquila v. Schlosberg*, 253 F. 2d 888 (D.C. Cir. 1958).

[43]220 F. 2d 299 (7 Cir. 1955).

[44]220 F. 2d at 304.

[45]*Rayco Mfg. Co. v. Chicopee Mfg. Co.*, 148 F. Supp. 588 (S.D. N.Y. 1957).

[46]The correlative factor of defendant's residence is so commonly present that it would be superfluous to analyze it separately. Generally this factor applies only to defendant's convenience rather than the interest of justice.

[47]*Pilot Life Ins. Co. v. Boone*, 236 F. 2d 457 (5 Cir. 1956); *Ultra Sucro Co. v. Illinois Water Treatment Co.*, 146 F. Supp. 393 (S.D. N.Y. 1956); *Bush v. United Air Lines*, 148 F. Supp. 104 (S.D. N.Y. 1956); *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (W.D. Pa. 1958).

[48]349 U.S. at 41.

codification of the doctrine of *forum non conveniens*, the residence of plaintiff in the district in which the suit is originally filed is still a factor against transfer. It is not, however, a conclusve factor.[49] Where the residence of plaintiff seems artificial, he having moved to the district for no explicable reason shortly before the complaint was filed, the fact of his residence will not prevent transfer, since the probability of "shopping for a forum" negatives the usual deference to plaintiff's place of residence.[50] *A fortiori*, a plaintiff who unexplainedly changed his residence to the district in which complaint was filed after the action was commenced does not thereby create a factor which weighs against transfer.[51]

The fact that plaintiff is not a resident of the district in which suit is brought is a factor favoring transfer.[52]

A fortiori, the fact that plaintiff resides in the district to which transfer is sought favors transfer.[53]

Where Cause of Action Arose:

The fact that no part of the cause of action arose in the district from which transfer is sought is a reason for transferring.[54]

Lack of Witnesses in Forum:

The fact that no witness for either party lives in the district favors transfer.[55]

Sources of Proof:

Ease of access to sources of proof has been stated to be a reason for transfer.[56]

There has, however, been little discussion of this point. It seems to be a composite of many reasons such as convenience of parties and witnesses, cost of obtaining willing witnesses, lack of compulsory process, and the possibility of a view of the premises. Each of these reasons is discussed separately in this paper.

Cost of Obtaining Willing Witnesses:

The additional costs of obtaining willing witnesses to attend court in the trans-

[49]In one of the cases considered in *Norwood*, plaintiff was a resident of the district in which suit was brought and yet transfer was granted. In *Nicol v. J. C. Penney Co.*, 97 F. Supp. 83 (E.D. Mich. 1951), the district judge transferred a personal injury suit to the district in which the accident occurred even though plaintiff, plaintiff's only eye witness and plaintiff's physician, nurses, hospital attendants, dental surgeon, optometrist (eight in all) were residents of the district in which suit was filed. In *Leppard v. Jordan's Truck Line*, 110 F. Supp. 811 (E.D. S.C. 1953), the court transferred an action from the district in which the plaintiff lived to the district in which the accident occurred, saying:

> "I do not think, however, that the court should hesitate to transfer an action away from the forum of plaintiff's residence where the conditions of Section 1404(a) have been met." 110 F. Supp. at 817.

See also *Morgan v. Illinois Cent. R. R.*, 161 F. Supp. 119 (S.D. Texas 1958).

[50]*Ayala v. A. H. Bull S. S. Co.*, 148 F. Supp. 703 (S.D. N.Y. 1957). See also *Findeaile v. Chesapeake & O. Ry.*, 159 F. Supp. 629 (E.D. N.Y. 1958).

[51]*Andino v. The S. S. Claiborne*, 148 F. Supp. 701 (S.D. N.Y. 1957).

[52]*Magnetic Engineering & Mfg. Co. v. Dings Magnetic Separator Co.*, 86 F. Supp. 13 (S.D. N.Y. 1949), modified on other grounds 178 F. 2d 866 (1950); *Apex Electrical Mfg. Co. v. Sears, Roebuck & Co.*, 87 F. Supp. 533 (S.D. Ohio 1949); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S.D. N.Y. 1950); *Southern Ry. v. Madden*, 235 F. 2d 198 (4 Cir. 1956); *Hill v. Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Cressman v. United Air Lines*, 158 F. Supp. 404 (S.D. N.Y. 1958).

[53]*Ex parte Blaski*, 245 F. 2d 737 (5 Cir. 1957); *Carbeck v. Baltimore & O. R. R.*, 160 F. Supp. 626 (E.D. Pa. 1958). See *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D. N.Y. 1955) [Plaintiffs principal offices located in transferee district.]

[54]*Greve v. Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D. N.M. 1949); *Magnetic Engineering & Mfg. Co. v. Dings Magnetic Separator Co.*, 86 F. Supp. 13 (S.D. N.Y. 1949); *White v. Employers' Liability Assur. Corp.*, 86 F. Supp. 910 (E.D. S.C. 1949); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S.D. N.Y. 1950); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *General Electric Co. v. Central Transit Warehouse Co.*, 127 F. Supp. 817 (W.D. Mo. 1955); *Chicago, Rock Island & Pac. R. R. v. Igoe*, 220 F. 2d 299 (7 Cir. 1955); *Southern Ry. v. Madden*, 235 F. 2d 198 (4 Cir. 1956); *Petition of National Bulk Carriers*, 143 F. Supp. 46 (S.D. N.Y. 1956); *Morgan v. Illinois Cent. R. R.*, 161 F. Supp. 119 (S.D. Texas 1958); *Bowers v. A. H. Bull & Co*, 144 F. Supp. 646 (S.D. N.Y. 1956); *Ultra Sucro Co. v. Illinois Water Treatment Co.*, 146 F. Supp. 393 (S.D. N.Y. 1956); *Findeaile v. Chesapeake & O. Ry.*, 159 F. Supp. 629 (E.D. N.Y. 1958); *Carbeck v. Baltimore & O. R. R.*, *supra*, note 53.

[55]*Kasper v. Union Pac. R. R.*, 97 F. Supp. 275 (E.D. Pa. 1951); *Paco Tankers, Inc. v. Atlantic Land & Improvement Co.*, 108 F. Supp. 406 (N.D. Fla. 1952); *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955); *Carbeck v. Baltimore & O. R. R.*, 160 F. Supp. 626 (E.D. Pa. 1958). [All witnesses lived in transferee district.]

[56]*Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 91 L.Ed. 1055 (1947); *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950); *Andino v. The S. S. Claiborne*, 148 F. Supp. (S.D. N.Y. 1957).

feror court over the transferee court is often considered as a factor favoring transfer.[57]

Lack of Compulsory Process:

Lack of compulsory process to compel the attendance of unwilling witnesses is a factor frequently given as a reason for transfer.[58]

> "The advantages of personal appearance of a witness over testimony by deposition as affecting both the interest of the parties and the performance of duties by the trial tribunal are so evident as to foreclose discussion. A party may not have the absolute right in all cases to secure or have available the personal attendance of witnesses but the desirability of so doing is beyond question and the convenience of personal attendance is an especial matter of consideration under the statute."[59]

If there is a choice between the personal testimony of a witness as to the facts (liability) and the testimony of a doctor as to injuries (damages), the former is to be preferred as "medical testimony suffers much less from being transcribed than does liability testimony."[60]

There has been no discussion in the cases as to what constitutes a "willing" witness as contrasted with an "unwilling" witness. As the terms are used in the cases a "willing" witness is generally used as synonymous with a party or an employee of a party and an "unwilling" witness one other than a party or an employee of a party.[61]

Lack of compulsory process to obtain necessary books, documents and records is also given as a reason favoring transfer.[62]

However, in a case which did not cite the *Norwood* decision, the fact that certain witnesses were beyond the reach of compulsory process was held to be insufficient to satisfy the strong showing which defendant must make.[63]

Impecunious Plaintiff:

A transfer will not generally be ordered to a forum which is financially out of

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[57]*Chaffin v. Chesapeake & O. Ry.*, 80 F. Supp. 957 (E.D. N.Y. 1948); *Greve v. Gibraltar Enterprises, Inc.*, 85 F. Supp. 410 (D. N.M. 1949); *Huff v. Nashville, C. & St. L. Ry.*, 88 F. Supp. 735 (S.D. N.Y. 1949); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S.D. N.Y. 1950); *Aircraft Marine Products, Inc. v. Burndy Eng. Co., supra*, note 56; *Kasper v. Union Pac. R. R.*, 97 F. Supp. 275 (E.D. Pa. 1951); *Leppard v. Jordan's Truck Line*, 110 F. Supp. 811 (E.D. S.C. 1953); *Rhodes v. Barnett, supra*, note 56; *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955); *United States v. American Linen Supply Co., supra*, note 56; *Chicago, Rock Island & Pac. R. R. v. Igoe*, 220 F. 2d 299 (7 Cir. 1955); *Gulf Oil Corp. v. Gilbert, supra*, note 56; *Andino v. The S. S. Claiborne, supra*, note 56.

[58]*Republique Francaise v. M. K. & T. Ry.*, 85 F. Supp. 295 (N.D. Texas 1949); *Huff v. Nashville, C. & St. L. Ry., supra*, note 57; *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950); *Healy v. New York, N.H. & H. R. R.*, 89 F. Supp. 614 (S.D. N.Y. 1949); *Mazula v. Delaware & Hudson R. R. supra*, note 57; *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S.D. N.Y. 1950); *Le Mee v. Streckfus Steamers, Inc.*, 96 F. Supp. 270 (E.D. Mo. 1951); *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *Kasper v. Union Pac. R. R., supra*, note 57; *James v. American Pac. S. S. Co.*, 99 F. Supp. 1016 (S.D. N.Y. 1951); *Leppard v. Jordan's Truck Line, supra*, note 57; *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *General Electric Co. v. Central Transit Warehouse Co.*, 127 F. Supp. 817 (W.D. Mo. 1955); *Brownell v. LaSalle Steel Co.*, 128 F. Supp. 548 (D. Del. 1955); *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp., supra*, note 57; *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955); *Chicago, Rock Island & Pac. R. R. v. Igoe, supra*, note 57; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L.Ed. 1055 (1947); *Hill v. Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. Minn. 1956); *Andino v. The S. S. Claiborne*, 148 F. Supp. 701 (S.D. N.Y. 1957).

[59]*Brownell v. LaSalle Steel Co., supra*, note 58, at 550. See also *Le Mee v. Streckfus Steamers, supra*, note 58; *James v. American Pac. S. S. Co., supra*, note 58; *Republique Francaise v. M. K. & T. Ry., supra*, note 58; and *Hill v. Upper Mississippi Towing Corp., supra*, note 58.

[60]*Harwich v. Atlantic C. L. R. R.*, 129 F. Supp. 558, 560 (D. Mass. 1955). See also *Nicol v. Koscinski*, 188 F. 2d 537 (6 Cir. 1951); *Conley v. Pennsylvania R. R.*, 87 F. Supp. 980 (S.D. N.Y. 1950).

[61]*Healey v. New York, N.H. & H. R. R.*, 89 F. Supp. 614 (S.D. N.Y. 1949); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S.D. N.Y. 1950); *Henderson v American Airlines, Inc.*, 91 F. Supp. 191 (S.D. N.Y. 1950); *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *Kasper v. Union Pac. R. R.*, 97 F. Supp. 275 (E.D. Pa. 1951); *General Electric Co. v. Central Transit Warehouse Co.*, 127 F. Supp. 817 (W.D. Mo. 1955).

[62]*United States v. Gerber*, 86 F. Supp. 175 (second case) (E.D. Pa. 1949); *Apex Electrical Mfg. Co. v. Sears, Roebuck & Co.*, 87 F. Supp. 533 (S.D. Ohio 1949).

[63]*Chicago, Rock Island & Pac. R. R. v. Hugh Breeding, Inc.*, 232 F. 2d 584 (10 Cir. 1956).

reach of an impecunious plaintiff.[64] However, the fact that a plaintiff, even though impecunious, has started another action involving the same subject matter which is set for trial in the transferee forum is considered of great weight in granting a transfer.[65]

Infirm Plaintiff:

If it would be impossible for plaintiff to travel to a transferee forum without endangering his health, transfer will be denied even though it normally would have been granted.[66]

Burden of Jury Duty When Cause of Action Did Not Arise in Forum:

The burden of jury duty, which has historically been imposed upon those who live in the vicinage where the cause of action arose, was one of the specifically listed criteria of *Gulf Oil Corp. v. Gilbert*. However, this factor does not seem to have been analyzed extensively, although it has often been mentioned.[67]

View of the Premises:

The desirability of a view of the premises is a reason for transferring.[68]

One court, subsequently reversed, apparently considered this factor to be of little weight when plaintiff had photographs which fairly and adequately depicted the scene of the accident, making unnecessary a view.[69] On the other hand, it has been noted that "photographs are good, but views are often better."[70]

Possibility of Consolidation:

The possibility of consolidating the case sought to be transferred with another action pending in the transferee court has been considered as a reason for transfer as consolidation "would save duplication in the production of witnesses and documents and time and expense to the parties."[71]

For various reasons, other cases have taken a different approach. The convenience of a working widow will prevail against the convenience of consolidating all the litigation arising out of an airplane crash.[72] If the action sought to be transferred was initiated prior to the action in the transferee jurisdiction, transfer may not be granted.[73] When one of the plaintiffs is not involved in defendant's cross action in the transferee forum, consolidation being irrelevant to him, consolidation will be accorded little importance as a factor favoring transfer.[74] And

[64]*Cinema Amusements, Inc. v. Loew's, Inc.*, 85 F. Supp. 319 (D. Del. 1949); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863 (S.D. N.Y. 1949); *Madden v. Southern Ry.*, 131 F. Supp. 415 (E.D. S.C. 1953); *rev'd* 235 F. 2d 198 (4 Cir. 1956); *Miller v. National Broadcasting Co.*, 143 F. Supp. 78 (D. Del. 1956); *Bush v. United Air Lines*, 148 F. Supp. 104 (S.D. N.Y. 1956).

[65]*Kasper v. Union Pac. R. R.*, 97 F. Supp. 275 (E.D. Pa. 1951).

[66]*Tyrill v. Alcoa S. S. Co.*, 158 F. Supp. 853 (S.D. N.Y. 1958).

[67]See, e.g., *Chicago, Rock Island & Pac. R. R. v. Igoe*, 220 F. 2d 299 (7 Cir. 1955); *Cinema Amusements, Inc. v. Loew's, Inc.*, 85 F. Supp. 319 (D. Del. 1949); *Kest v. New York Cent. R. R.*, 116 F. Supp. 615 (W.D. N.Y. 1953); *Morgan v. Illinois Cent. R. R.*, 161 F. Supp. 119 (S.D. Texas 1958).

[68]*Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L.Ed. 1055 (1947); *Chicago, Rock Island & Pac. R. R. v. Igoe, supra*, note 67; *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950); *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D Cal. 1951); *Leppard v. Jordan's Truck Line*, 110 F. Supp. 811 (E.D. S.C. 1953); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *Harwich v. Atlantic C. L. R. R.*, 129 F. Supp. 558 (D. Mass. 1955); *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955); *Southern Ry. v. Madden*, 235 F. 2d 198 (4 Cir. 1956); *Ultra Sucro Co. v. Illinois Water Treatment Co.*, 146 F. Supp. 393 (S.D. N.Y. 1956); *Ferment-Acid Corp. v. Miles Laboratories*, 153 F. Supp. 19 (S.D. N.Y. 1957); *Carbeck v. Baltimore & O. R. R.*, 160 F. Supp. 626 (E.D. Pa. 1958) [Court of vicinage better qualified to determine whether or not view is, in fact, needed.]

[69]*Madden v. Southern Ry.*, 131 F. Supp. 415 (E.D. S.C. 1953); rev'd 235 F. 2d 198 (4 Cir. 1956).

[70]*Harwich v. Atlantic C. L. R. R.*, 129 F. Supp. 558, 560 (D. Mass. 1955); Contra *Mazinsky v. Dight*, 99 F. Supp. 192 (W.D. Pa. 1951).

[71]*Christopher v. American News Co.*, 176 F. 2d 11, 12 (7 Cir. 1949). The same conclusion was reached in *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955); *Minnesota Mining & Mfg. Co. v. Technical Tape Corp.*, 123 F. Supp. 497 (N.D. Ill. 1954); *Apex Electrical Mfg. Co. v. Sears, Roebuck & Co.*, 87 F. Supp. 533 (S.D. Ohio 1949); *Ex parte Blaski*, 245 F. 2d 737 (5 Cir. 1957); *Pharma-Craft Corp. v. F. W. Woolworth Co.*, 144 F. Supp. 298 (M.D. Ga. 1956); *United States v. Kraft Foods Co.*, 146 F. Supp. 132 (E.D. Pa. 1956); *Crawford v. The S. S. Shirley Lykes*, 148 F. Supp. 958 (S.D. N.Y. 1957); *Winsor v. United Air Lines*, 153 F. Supp. 244 (E.D. N.Y. 1957). Cf. *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 135 F. Supp. 505 (S.D. N.Y 1955). [Action dismissed even though brought fifteen days before a similar action in another district on grounds that other district was more convenient.] Although 1404 (a) was not involved, the criteria used and the result were similar.

[72]*Bush v. United Air Lines*, 148 F. Supp. 104 (S.D. N.Y. 1956).

[73]*Seaboard Surety Co. v. Texas City Refining, Inc.*, 109 F. Supp. 468 (D. Del. 1952); see *Federal Electric Products Co. v. Frank Adam Electric Co.*, 100 F. Supp. 8 (S.D. N.Y. 1951).

[74]*Mazinski v. Dight*, 99 F. Supp. 192 (W.D. Pa. 1951).

when trial after consolidation would not dispose of the entire controversy in the suit sought to be transferred but only one of the two separate causes of action, transfer has been denied.[75]

One court, however, has rejected the consolidation argument entirely on the ground that the transferor forum cannot consolidate, consolidation being at the discretion of the transferee.[76]

Existence of Similar Case Elsewhere:

In a suit based upon patent infringement, a defendant has averred in support of a successful motion to transfer that a suit involving the same patent was pending in a district other than the transferor or transferee district.[76a] Although such a fact does not affirmatively promote the transferee district, it acts in a negative manner to lessen the importance of the particular case and minimize the weight to be given to plaintiff's choice of forum.

Possibility of Defendant Bringing in Third Party:

It has been held that a factor favoring transfer exists when defendant can bring in a third party, who may be liable to defendant, in the transferee, but not in the transferor, court.[77] However, this possibility may not be of sufficient strength to outweigh the inconvenience to the plaintiff if transfer is granted:

> "Undoubtedly, it is desirable that the rights of interested parties, whenever possible, should be disposed of in a single litigation. But plaintiffs should not be inconvenienced and burdened with additional expense to litigate in a distant forum on the possibility that an alleged tort-feasor may be indemnified in plaintiffs' action by another alleged tort-feasor."[78]

Delay in Making Motion to Transfer:[79]

Delay in making a motion for transfer weighs against the success of the motion.[80]

One court has conditioned the granting of a motion for transfer upon recompensing the other party for any expense which the delay has occasioned.[81]

State of Docket:

The fact that the docket is less congested in the transferee court than in the transferor court is a reason frequently given for transferring.[82]

Conversely, the fact that the docket is less congested in the transferor court than in the transferee court is a reason

[75] *Automatic Washer Co. v. Easy Washing Machine Corp.*, 91 F. Supp. 894 (N.D. N.Y. 1950).

[76] *Anschell v. Sackheim*, 145 F. Supp. 447 (D. N.J. 1956).

[76a] *Stiffel Co. v. Sears, Roebuck & Co.*, 162 F. Supp. 637 (M.D. N.C. 1958). The defendants in this case made a particularly extensive showing of the factors favoring transfer.

[77] *Banachowski v. Atlantic Refining*, 84 F. Supp. 444 (S.D. N.Y. 1949); *Nicol v. J. C. Penney Co.*, 97 F. Supp. 83 (E.D. Mich. 1951). See *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D. N.Y. 1955) [Possibility of joinder of indispensable party.] Contra *Rubin v. General Tire & Rubber Co.*, 18 F.R.D. 51 (S.D. N.Y. 1955).

[78] *Robbins Music Corp. v. Alamo Music, Inc.*, 119 F. Supp. 29, 30 (S.D. N.Y. 1954).

[79] See analysis in note, Delay in Moving to Transfer to Another District Under Section 1404(a), 10 Okla. L. Rev. 341 (1957).

[80] *Brainard v. Atchison T. & S. F. Ry.*, 81 F. Supp. 211 (N.D. Ill. 1948) [motion made one week before trial]; *Levenson v. Little*, 81 F. Supp. 513 (S.D. N.Y. 1949) [motion made after action pending one year]; *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S.D. N.Y. 1950) [motion made after much testimony taken before special master]; *Nagle v. Pennsylvania R. R.*, 89 F. Supp. 822 (N.D. Ohio 1950) [motion made after case set for trial]; *Adler v. McKee*, 92 F. Supp. 613 (S.D. N.Y. 1950) [motion made after mistrial]; *Saper v. Long*, 131 F. Supp. 795 (S.D. N.Y. 1955) [motion made after case set for trial]; *Metropolitan Life Ins. Co. v. Potter Bank & Trust Co.*, 135 F. Supp. 645 (W.D. Pa. 1955) [motion made after case set for trial].

[81] *Harwich v. Atlantic C. L. R. R.*, 129 F. Supp. 558 (D. Mass. 1955).

[82] *United States v. E. I. du Pont de Nemours & Co.*, 83 F. Supp. 233 (D. D.C. 1949); *United States v. Scott & Williams, Inc.*, 88 F. Supp. 531 (S.D. N.Y. 1950); *Maloney v. New York, N. H. & H. R. R.*, 88 F. Supp. 568 (S.D. N.Y. 1949); *Hansen v. Nash-Finch Co.*, 89 F. Supp. 108 (D. Minn. 1950); *Mazula v. Delaware & Hudson R. R.*, 90 F. Supp. 966 (S.D. N.Y. 1950); *Ortiz v. Union Oil Co.*, 102 F. Supp. 492 (S.D. N.Y. 1952); *Kest v. New York Cent. R. R.*, 116 F. Supp. 615 (W.D. N.Y 1953); *Rhodes v Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *Harwich v. Atlantic C. L. R. R.*, *supra* note 81; *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955); *Chicago, Rock Island & Pac. R. R. v. Igoe*, 220 F. 2d 299 (7 Cir. 1955); *Fannin v. Jones*, 229 F. 2d 368 (6 Cir. 1956) [A relevant factor in a wrongful death claim]; *United States v. Kraft Foods Co.*, 146 F. Supp. 132 (E.D. Pa. 1956); *Fort Dodge Laboratories v. Iowa Cooperative Ass'n*, 147 F. Supp. 606 (S.D. Iowa 1956); *United States v. Swift & Co.*, 158 F. Supp. 551 (D. D.C. 1958); *Caldwell Mfg. Co. v. Unique Balance Co.*, 18 F.R.D. 258 (S.D. N.Y. 1955); *Carbeck v Baltimore & O. R. R.*, 160 F. Supp. 626 (E.D. Pa. 1958); But see *Peyser v. General Motors Corp.*, 158 F. Supp. 526 (S.D. N.Y. 1958) [Congestion "never a factor to which great weight is assigned."] *Davis v. Owens-Corning Fiberglas Corp.*, 161 F. Supp. 371 (N.D. Ohio 1958); *Metropolitan Life Ins. Co. v. Potter Bank & Trust Co.*, 135 F. Supp. 645 (W.D. Pa. 1955); *Petition of Baker-Whiteley Towing Co.*, 145 F. Supp. 904 (D. Md. 1956).

given for not transferring.[83] Three courts have held, however, that the transferee court could advance the case on the docket and have thus minimized, if not destroyed, the effect of a congested docket in the transferee court.[84]

In addition to the possibility that the transferee court could advance the case, the possibility of a consolidation of suits in the transferee court, in transferring to a district with a congested docket, tends to negate the effect of that congestion.[85]

When the case is of a nature which will require extensive pre-trial activity, the existence of congested docket in the transferee court is not of such substantial significance as to prevent transfer.[86] And the fact that the case is on the "ready" docket loses significance in the light of plaintiff's procrastination in answering interrogatories.[87]

Taking another approach, it has been specifically held that the state of congestion of the docket is irrelevant as regards transfer on the ground that the remedy of such a situation is for the legislature, not the courts.[88]

Applicable Law:

The fact that the governing or applicable law is not that of the transferor forum but is that of the transferee forum is generally considered as a factor favoring transfer.[89]

Three courts have minimized or disregarded this reason, one on the ground that no intricate problems of foreign law had been suggested;[90] another on the ground that, absent an answer, it could not be determined whether the substantive law of the respective forums varied;[91] and a third on the ground that, in the absence of forum shopping, this reason was of little weight.[92]

Enforcibility of Judgment:

The enforcibility of any judgment obtained has been stated to be a reason to be considered.[93] No discussion has been found on this point.[94]

Racial Prejudice:

When a showing is made that racial prejudice would prevent a fair trial in the transferee forum, transfer will be denied in the interests of justice even though the convenience of parties and witnesses would have been served by the transfer.[95]

FACTORS NOT CONSIDERED

The interest or convenience of counsel for plaintiff is not a factor to be considered.[96]

An assertion that a larger verdict will result from not transferring is without

[83] *Mazinski v. Dight*, 99 F. Supp. 192 (W.D. Pa. 1951); *First Nat. Bank of Boston v. Fidelity & Deposit Co. of Md.*, 107 F. Supp. 894 (D. Mass. 1952).

[84] *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp.*, 131 F. Supp. 21 (N.D. Ga. 1955); *Aircraft Marine Products, Inc. v. Burndy Eng. Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *United States v. National City Lines*, 80 F. Supp. 734 (S.D. Cal. 1948); aff'd 337 U.S. 78 (1949). Contra *Mazinsky v. Dight, supra* note 83.

[85] *Chas. Pfizer & Co. v. Olin Mathieson Chemical Corp., supra* note 84.

[86] *Pharma-Craft Corp. v. F. W. Woolworth Co.*, 144 F. Supp. 298 (M.D. Ga. 1956).

[87] *Bowers v. A. H. Bull & Co.*, 144 F. Supp. 646 (S.D. N.Y. 1956).

[88] *Collins v. American Automobile Ins. Co.*, 230 F. 2d 416 (2 Cir. 1956).

[89] *Huff v. Nashville, C. & St. L. Ry.*, 88 F. Supp. 735 (S.D. N.Y. 1949); *Hansen v. Nash-Finch Co.*, 89 F. Supp. 108 (Minn. 1950); *Kasper v. Union Pac. R. R.*, 97 F. Supp. 275 (E.D. Pa. 1951); *Lehman v. Napier*, 101 F. Supp. 313 (S.D. Iowa 1951); *Leppard v. Jordan's Truck Line*, 110 F. Supp. 811 (E.D. S.C. 1953); *Kest v. New York Cent. R. R.*, 116 F. Supp. 615 (W.D. N.Y. 1953); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953); *General Electric Co. v. Central Transit Warehouse Co.*, 127 F. Supp. 817 (W.D. Mo. 1955); *Southern Ry. v. Madden*, 235 F. 2d 198 (4 Cir. 1956); *Pilot Life Ins. Co. v. Boone*, 236 F. 2d 457 (5 Cir. 1956); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L.Ed. 1055 (1947); *MacNeil Bros. Co. v. Cohen*, 158 F. Supp. 126 (D. Md. 1958).

[90] *Harwich v. Atlantic C. L. R. R.*, 129 F. Supp. 588 (D. Mass. 1955).

[91] *Marks v. Fireman's Fund Ins. Co.*, 109 F. Supp. 800 (S.D. N.Y. 1953).

[92] *Schilling-Hillier S.A.I.E.C. v. Virginia Car Chem. Corp.*, 19 F.R.D. 271 (S.D. N.Y. 1956).

[93] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 91 L. Ed. 1055 (1947); *Rhodes v. Barnett*, 117 F. Supp. 312 (S.D. N.Y. 1953).

[94] Cf. *Vanity Fair Mills v. T. Eaton Co.*, 234 F. 2d 633 (2 Cir. 1956), in which the probable futility of an injunction is given as a reason for invoking the doctrine of forum non conveniens; the more convenient forum being in Canada.

[95] *Wilson v. Great Atlantic & Pac. Tea Co.*, 156 F. Supp. 767 (W.D. Mo. 1957).

[96] *United States v. Scott & Williams, Inc.*, 88 F. Supp. 531 (S.D. N.Y. 1950); *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S.D. N.Y. 1950); *Molloy v. Bemis Bros. Bag Co.*, 130 F. Supp. 265 (SD. N.Y. 1955); *Ferment-Acid Corp. v. Miles Laboratories*, 153 F. Supp. 19 (S.D. N.Y. 1957); *Cressman v. United Air Lines*, 158 F. Supp. 404 (S.D. N.Y. 1958); *Chicago, Rock Island & Pac. R. R. v. Igoe*, 220 F. 2d 299 (7 Cir. 1955). Contra *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (W.D. Pa. 1958).

merit on the ground that such conclusion is speculative,[97] or there is no showing of bias in the transferee court.[98] As has been said, "jurors of the vicinage traditionally have been considered the best qualified to render a proper verdict,"[99] and "it doesn't make sense to venue lawsuits on the basis of the claimed generosity or reputed parsimony of veniremen."[100]

Similarly a court refused to seriously consider an argument that transfer not be granted since "it would be fairer to all concerned to have the litigation settled in a neutral forum rather than a forum where one of the parties transacts its principal business."[100a]

On the assumption that the law of the transferee circuit would apply after transfer,[101] it has been held that a conflict of decisions between the circuits was irrelevant in determining whether or not transfer should be granted.[102] The court stated:

> "We are not impressed by the argument that such transfer should be denied because of an alleged conflict of decision between this Circuit and the Seventh on an important question of law involved in the case. If there be such conflict, this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a distict judge on application for transfer under 28 U.S.C. § 1404 (a). We have no sympathy with shopping around for forums."[103]

However, where laches might have applied if the transferee forum's statute of limitations were applicable, transfer was conditioned upon the use of the statute of limitations of the transferor forum.[104]

It is also irrelevant that if defendants are unsuccessful and a contract is upheld, plaintiff might be required to bring specific performance, which he could not do in the transferor court.[105] Transfer was denied on the ground that defendant's reasoning is based on the assumption that defendant would not carry out his contractual obligations, an improper consideration.

CONCLUSION

When the factors favoring transfer substantially predominate over those weighing against transfer, transfer will be granted. A more specific conclusion cannot be reached since the factors present change from case to case and the precise weight to be given each factor, as well as the exact extent to which the factors favorable to transfer must predominate over those unfavorable, must vary with the individuality of the various courts.

The factors which have been listed are those which have been mentioned by the courts. The listing is in no way exclusive and is open to any new relevant factor which ingenious counsel may conceive. Moreover, as attorneys become progressively more experienced in this area, extensive showing is made of as many factors as possible favoring transfer, while opposing counsel elucidate numerous factors which would tend to cause transfer to be refused. Thus the role of any single factor fades, and it is important only as one aspect of a pattern of factors.[106] The number of possible factual situations is, of course, infinite. The reported cases themselves are numerous, since scarcely an advance sheet of the Federal Supplement appears without a case involving transfer under § 1404 (a).

Thus this paper has not been and could not be definitive concerning the factors to be considered in determining a motion to transfer, but can only indicate those areas which already have been judicially explored.

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[97] *Chicago, Rock Island & Pac. R. R. v. Igoe*, 212 F. 2d 378 (7 Cir. 1954), the same case on second appeal, 220 F. 2d 299 (7 Cir. 1955); *Tuck v. Pennsylvania R. R.*, 122 F. Supp. 527 (E.D. Pa. 1954).

[98] *Stewart v. Atchison T. & S. F. Ry.*, 92 F. Supp. 172 (E.D. Mo. 1949).

[99] *Lynch v. Luckenbach S. S. Co.*, 104 F. Supp. 494, 495 (S.D. N.Y. 1952).

[100] *Hill v. Upper Mississippi Towing Corp.*, 141 F. Supp. 692, 696 (D. Minn. 1956).

[100a] *Early & Daniel Co. v. Wedgefield, Inc.*, 164 F. Supp. 414, 418 (M.D. N.C. 1958).

[101] This assumption may be invalid. See note 5, *supra*.

[102] *Clayton v. Warlick*, 232 F. 2d 699 (4 Cir. 1956).

[103] 232 F. 2d at 706.

[104] *Crawford v. The S. S. Shirley Lykes*, 148 F. Supp. 958 (S.D. N.Y. 1957); *May v. The Steel Navigator*, 152 F. Supp. 254 (S.D. N.Y. 1957); *Hargrove v. Louisville & N. R. R.*, 153 F. Supp. 681 (W.D. Ky. 1957).

[105] *American Louisiana Pipe Line Co. v. Gulf Oil Corp.*, 158 F. Supp. 13 (E.D. Mich. 1957).

[106] Of course, where other factors are balanced a single factor may prove completely controlling. In *Fein v. Public Service Coordinated Transport*, 165 F. Supp. 370 (E.D. Pa. 1958), the court felt that there was no aspect of convenience as between the transferor and transferee districts, due to their proximity to each other, so that the sole ground for transfer, the possibility of impleading a third party defendant, was held to be absolutely determinative of the "interest of justice" and transfer was granted.

A Lawyer's Interpretation of the Insurance Policy Language*

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THE LANGUAGE of an ordinary accident and health policy has long been a fruitful source of litigation. Oftentimes it is estimated that by resisting claims on the basis of the interpretation of certain words or phrases in the policy, insurance companies are soliciting policies, collecting premims and then escaping liaility for their advertised coverage by technical arguments. This is untrue. By and large, insurance companies of high standing desire to pay their policy obligations fully and promptly without quibble or technical evasion. As long as exaggerated and unreasonable and fraudulent claims are prevalent, however, insurance companies will have to resist payments which seem to responsible managers unfounded and unjust. For this reason, questions will continue to arise as to the meaning of the English language which is most baffling to the companies, to the policyholders, and to the courts alike.[1]

Everyone, of course, is able to determine the "true and correct" meaning of the language of the particular policy involved —until his definition must be applied for coverage purposes to a specific and often pathological factual situation. Interpretation of a particular provision in a vacuum is relatively easy; application of the definition to an individual claim is sometimes next to impossible.[2] An attorney, when requested to interpret policy language for the determination of a claim, the estimation of its proper settlement value, or the preparation of the defense of prospective litigation, is confronted with an endless number of seemingly conflicting cases—decisions which become abstractions without meaning unless considered with reference to the facts and circumstances under which they were made. Small wonder, therefore, that this prolific source of litigation—policy language—has been a source of embarrassment to the Bar in advising clients as to the status of the law.

The title chosen for my address, "A Lawyer's Interpretation of the Insurance Policy Language", suggests that its scope is as vast and endless as the legion of cases which exist involving the construction of policy terminology. In the last couple of years in Texas alone, there are at least five cases which are of extreme importance to the accident and health field, and which would justify a detailed study. Each of these five cases involves the interpretation of terms found throughout a standard accident and health policy. One case is concerned with the coverage of the policy, that is, was the injury caused by "accidental means".[3] A second involves the construction of a designated injury which the policy covers—hernia.[4] Another case interpreted an exclusionary clause, the suicide or intentional injury provision.[5] The final two Texas cases involve situations in which the question of coverage was evident, but a controversy as to what benefits the insured were entitled to receive was resolved by the interpretation of specific words in the benefit portion of the policy.[6]

The Galveston Court of Civil Appeals in *Radcliffe v. National Life & Accident Insurance Co.*,[7] was concerned with the interpretation of "accidental means", certainly the most prolific source of litigation in the policy language interpretation

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[1]32 Cornell L.Q. 378 (1947).

[2]1954 Ins. L.J. 248.

[3]*Radcliffe v. National Life & Accident Insurance Co.*, 298 S.W. 2d 213 (Tex. Civ. App. 1957, ref'd n.r.e.)

[4]*National Bankers Life Insurance Co. v. Cartwright*, 272 S.W. 2d 377 (Tex. Civ. App. 1954, no writ history).

[5]*Life & Casualty Insurance Co. of Tenn. v. Martinez*, 299 S.W. 2d 181 (Tex. Civ. App. 1957, no writ history).

[6]*Red v. Group Medical & Surgical Service*, 298 S.W. 2d 623 (Tex. Civ. App. 1957, no writ history); *Crane v. Bankers Life & Casualty Co.*, 281 S.W. 2d 117 (Tex. Civ. App. 1955, no writ history).

[7]298 S.W. 2d 213 (Tex. Civ. App. 1957, ref'd n.r.e.)

cases. The eighteen month old infant son of the insured died as the result of aspirating vomitus which caused its asphyxiation or suffocation. During trial one of the physicians described the mechanical aspects of aspiration of vomitus as:

> "The mechanics of it, by the act of vomiting, the stomach contents are forced in the mouth and throat, and when the child tries to breathe, it is sucked back down into the lungs and the infant smothers. The oxygen supply is cut off. The 'acid contents of the stomach are very irritating to the lining of the throat and causes a swelling and reduces the amount of oxygen they can absorb.' "[8]

The insurance policy provided for the payment of death benefits upon proof of "bodily injuries effected solely through violent, external and accidental means, and that such bodily injuries have directly and independently of all other causes, caused the death . . ." The insured contended that food which the baby had ingested a few hours before death was the sole cause or means of his death and that such food constituted a violent external and accidental means. The court disagreed, holding that both the regurgitation of the vomitus and the aspiration of it were proximate causes and efficient causes, concurring with the stomach contents to produce the asphyxiation which was the cause of death. Further, the court stated that both the regurgitation and the aspiration were internal as distinguished from external causes. Finally, the court stated as another ground for the decision that even if the aspiration of the vomitus was accidental, the *regurgitation was not.*[9] Thus it seems that an injury due to an involuntary internal reaction such as a sneeze or a ruptured blood vessel for which no cause may be assigned will not be compensable for two reasons: such an injury is internal, and it is not caused by accidental means. This holding should be compared with the somewhat earlier case of *Pacific Mutual Life Insurance Co. of California v. Schlakzug,*[10] in which the claimant recovered for death caused by infection entering the body when the insured plucked a hair from his nose.

Less than one month after the *Radcliffe* case, the Galveston court of appeals rendered another accident and health decision, not delineating the area of coverage but instead determining what expenses may be properly recovered by a person admittedly within the limits of the policy. *Red v. Group Medical & Surgical Service,*[11] involved a plaintiff whose infant son had fallen victim to spinal meningitis. The boy recovered from the disease but was left with neuro-deafness and had to be sent to the Houston school for deaf children to be taught to read lips. The plaintiff's policy had a catastrophic illness endorsement, which specified the "items of expense" to be recovered, including "the professional fees of the attending physicians and consulting physicians and specialists to whom the patient may be referred."

The plaintiff sued under this clause for the recovery of the attendance and tuition fees charged by the school and for the additional expense of private tutoring, contending they represented fees of "specialists to whom the patient" was referred. The court of civil appeals affirming the trial court's decision held that the only proper *"items of expense"* contemplated by the policy were medical or surgical specialists—not those of educational institutions of any kind. The court stated:

> ". . . we think we would be going far beyond the intent of the parties as manifested by the contract were we to hold that fees paid to a 'school' or tutor for instruction in lip reading and to acquire a new skill as a substitute for hearing are items of expense incurred in the treatment and care of a patient by way of professional fees of 'specialists' within the meaning of the writing, however broadly construed."[12]

A third Texas case also deals with the problem of what recovery is to be awarded to one who is admittedly within the coverage of the policy. In *Crane v. Bankers Life & Casualty Co.,*[13] the insured was

[8] *Radcliffe v. National Life & Accident Insurance Co., supra* at 215.

[9] Felix, *Injury by Accidental Means,* 1947 Ins. L. J. 917; 24 Cornell L.Q. 129 (1938); 166 A.L.R. 469 (1947).

[10] 143 Tex. 264, 183 S.W. 2d 709 (1944).

[11] 298 S.W. 2d 623 (Tex. Civ. App. 1957, no writ history).

[12] *Red v. Group Medical & Surgical Service, supra* at 626.

[13] 28 S.W. 2d 117 (Tex. Civ. App. 1955, no writ history).

covered by the normal health and accident policy, specifically limiting recovery for hospital benefits to "a period not exceeding (120) hospital days for any one continuous period of sickness . . ." The insured was confined to the hospital from April 10, 1953, to August 20, 1953. On November 16, 1953, he returned to the hospital, it being admitted that he returned as a result of the same physical infirmity that caused his first confinement.

The claimant contended that he suffered no disability from sickness from August 20 to November 16, the dates of his release and subsequent readmittance to the hospital. The medical testimony was to the effect that although plaintiff was "continually diseased" he had recovered to the extent that he was able to care for himself for the six week period of his release. The court reasoned that since plaintiff could recover under the policy only for sickness which required hospitalization, that when he was discharged from the hospital in August, the plaintiff was no longer suffering from "sickness" within the meaning of the policy. Therefore his second sickness although resulting from the same physical infirmity was not continuous within the meaning of the policy language and plaintiff was entitled to an additional 120 days payment of hospital benefits. In effect, "one continuous sickness" was construed to mean "one continuous hospitalization".

In *National Bankers Life Insurance Co. v. Cartwright*[14] the policy language before the court for interpretation was "hernia". It was held that a herniated disc between vertebrae in the spinal column is not a hernia as that term is used in the standard accident and health policy. And in *Life & Casualty Insurance Co. of Penn. v. Martinez*[15] the court reaffirmed the principle that whether or not an injury is intentionally inflicted is to be determined from the viewpoint of the insured. Thus where the decedent was fleeing from a policeman who had fired a warning shot and there was evidence that his friends warned the insured he would be shot unless he stopped, a fact issue was presented as to whether the insured from his viewpoint should have anticipated that in all reasonable probability the policeman would kill him if he did not stop. Judgment for the claimant was reversed for a new trial to be had in accordance with this instruction.

These recent Texas cases actually form a skeletal policy by the language construed—the coverage clause, "accidental means"; a specified assumption clause, "hernia"; and exclusionary clause, "intentional injury"; and the benefit section, "items of expense", "continuous illness". They illustrate the fact that the interpretation of language in an accident and health policy is not limited to any particular phrase or to any particular section. It would be impossible for one to attempt to select all of the words in a standard policy which have been subject to judicial construction and which might in the future require "interpretation" upon the occurrence of the proper factual circumstances.

Indeed, it would only be a slight exaggeration if an exaggeration at all, to make the statement that there is not one word in the normal accident and health insurance policy about which one might not, given the requisite factual situation, be confronted with the question, "How is this word to be interpreted?" Every one is familiar with the interpretation and construction of such policy language as, "accident," "accidental means," "violent and external means,"[16] "bodily injury,"[17] "regular and personally attended,"[18] "hospital,"[19] "confinement"[20] and their variants. Nor is it surprising to find cases

[14]272 S.W. 2d 377 (Tex. Civ. App. 1954, no writ history).

[15]299 S.W. 2d 181 (Tex. Civ. App. 1957, no writ history).

[16]*Eschweiler v. General Accident Fire & Life Assurance Corp.*, 136 F. Supp. 717 (1955); *Johnson v. National Life & Accident Insurance Co.*, 92 Ga. App. 818, 90 S.E. 2d 36 (1955); *Morgan v. Indemnity Insurance Co. of North America*, 276 App. Div. 123, 93 N.Y.S. 2d 16 (1949); 91 Univ. Pa. L. Rev. 362 (1942); 166 A.L.R. 469 (1947).

[17]*Canadium Radium & Uranium Corp. v. Indemnity Insurance Co. of North America*, 411 Ill. 325, 104 N.E. 2d 250 (1952); 65 Harv. L. Rev. 1071 (1952); 117 A.L.R. 739 (1938); 117 A.L.R. 766 (1939).

[18]*World Insurance Co. v. Carey*, 2 CCH Life Cases (2d) 655 (D.C. Ct. App. 1955); *Dixon v. Pacific Mutual Life Insurance Co.*, 3 CCH Life Cases (2d) 372 (U.S. Dist. Ct. N.Y. 1957).

[19]*Blair v. Automobile Owners Safety Ins. Co.*, 2 CCH Life Cases (2d) 900 (Kan. Sup. 1955); Bernhard, *Definition of "Hospital" and "Physician"—Claim Problems*, 1954 Ins. L.J. 248 (1954); 35 A.L.R. 2d 897 (1954).

[20]*Penrose v. Commercial Travelers Ins. Co.*, 2 CCH Life Cases (2d) 65 (Idaho Sup. 1954); 107 A.L.R. 289 (1937).

construing such as "home",[21] "automobile",[22] "aircraft",[23] "war",[24] "shooting self-inflicted."[25] However, one is amazed to find that the outcome of insurance cases has hinged upon the judicial construction given seemingly insignificant words as "or",[26] "upon",[27] and "throw".[28]

The insurance company involved in the case of *Vinograd v. Travelers Protective Association of America*[29] actually lost the case because the conjunction "or" was interpreted to mean "and". The decedent in that case was killed when an automobile he was driving was struck by a railroad train at a highway crossing. The policy excluded recovery for injuries which "are the result of voluntary *or* unnecessary exposure to danger or to obvious risk of injury". The trial court found that the death was not the result of "voluntary exposure to danger" since the decedent was merely negligent, but further found that it was the result of "unnecessary exposure" to danger and therefore denied recovery. The Supreme Court of Wisconsin, however, admitting that at first blush it seemed as if it was taking an unwarranted liberty with the English language, construed the conjunctive "or" to mean "and". Thus recovery would be permitted unless the exposure to danger was both "voluntary and unnecessary". Nor is this holding unique; many cases to the same effect exist in other jurisdictions.[30]

The word "upon" was crucial to the determination of *Christoffer v. Hartford Accident & Indemnity Co.*[31] The insurer was to pay medical expenses arising out of injuries caused by an accident while "in or upon, entering or alighting from" an automobile. The insured was struck by another vehicle while apparently changing a flat tire on his automobile. The court held that he was "upon" the automobile within the contemplation of the policy in that his hands were upon the wheel of the automobile and thus in a position of contact against the automobile.

Similarly, the case of *Jones v. Federal Life Insurance Co.*[32] hinged on the construction of the word "from". Recovery was denied under a policy provision allowing indemnity if the insured were "accidentally thrown from" the automobile. The court held this phrase did not cover the insured who was thrown from the back seat to the top of the automobile when her vehicle struck a pile of dirt. "Thrown from" means a hurling or catapulting of a person from the vehicle so that thereafter the person and the vehicle are "independent orbits of action and momentum".

In a sense these cases dealing with the construction of the seemingly insignificant three-letter conjunction and prepositions are no less important than those which are decided on the basis of the interpretation of such phrases as "accidental means", "bodily injuries", "external causes", and so forth. If a case is lost, it is little consolation to know that it was lost in the battle over a fourteen letter word and not a two letter word. For this reason, it seems that perhaps we may be taking the wrong approach to the interpretation of insurance policy language. In this regard, an incident related by George Van Schaick of the New York Bar seems peculiarly applicable.[33]

Some years ago a young lawyer was arguing a case before a New York judge as to whether or not the township was obliged to support certain poor people. He started by reviewing the authorities at the time of Queen Elizabeth, the Tudors down through the Stuarts and at last, after a good hour, he got down to the Colonies and then the State of New

[21] *World Insurance Co. v. Puckett*, 2 CCH Life Cases (2d) 1254 (Ga. Ct. App. 1956).

[22] *National Casualty Co. v. Thompson*, 3 CCH Life Cases (2d) 582 (Ala. Ct. App. 1957); 38 A.L.R. 2d 867 (1954); 12 A.L.R. 2d 598 (1950); 165 A.L.R. 916 (1946).

[23] *New York Life Insurance Co. v. Jones*, 2 CCH Life Cases (2d) 505 (5th Civ. 1955); *Scarboro v. Pilot Life Insurance Co.*, 242 N.C. 444, 88 S.E. 2d 133 (1955); 54 A.L.R. 2d 413 (1957).

[24] *Christensen v. Sterling Insurance Co.*, 2 CCH Life Cases (2d) 435 (Wash. Ct. App. 1955).

[25] *Colonial Life & Accident Insurance Co. v. Croom*, 3 CCH Life Cases (2d) 452 (Ga. Ct. App. 1957).

[26] *Vinograd v. Travelers Protective Ass'n. of America*, 27 Wis. 316, 258 N.W. 787 (1935); 106 A.L.R. 1234 (1937).

[27] *Christoffer v. Hartford Accident & Indemnity Co.*, 123 Cal. App. 2d 979, 267 P. 2d 887 (1954).

[28] *Jones v. Federal Life Insurance Co.*, 124 Col. 106, 234 P. 2d 615 (1951).

[29] 217 Wis. 316, 258 N.W. 787 (1935); 106 A.L.R. 1234 (1937).

[30] 106 A.L.R. 1234 (1937).

[31] 123 Cal. App. 2d 979, 267 P. 2d 887 (1954).

[32] 124 Col. 106, 234 P. 2d 615 (1951).

[33] Van Schaick, *Accidental Means in New York—A Rational Approach*, 32 Cornell L. Q. 378 (1947).

York. At this point the judge interrupted him and asked: "Counselor, did you read the case on this point in 177 N. Y. Reports?"

The lawyer replied, "Judge, I been working on this case the last six months, and only got down to 60 N. Y. last night."

The judge replied, "You started at the wrong end."

Are not we as attorneys and managers and directors of the accident and health insurance enterprise doing just this in regard to insurance policy language—starting at the wrong end? We construct policies, solicit customers, collect premiums. Then when a claim arises, the validity of which depends upon the interpretation to be given certain policy language, we rush to the myriad of conflicting decisions to see if the particular word or phrase has been interpreted in our favor. More often than not the term has not been interpreted. Even if it has been judicially construed, in all probability the interpretation was not rendered in the light of a factual situation like that involving the claim with which we are concerned. Moreover a *caveat* must be added to these decisions in regard to the effect of sympathetic juries, as well as judges, because of their attitude that if an insurance policy were strictly interpreted no policy holder would ever recover.[34] It is for these reasons that I feel that your valuable time may be better used than in merely rehashing a number of decisions, all of which are available to everyone through the various reporter systems and annotations.

It is no secret to any of us that there has been a seeming rivalry between the insurers and the courts, and that the insurance companies are at a distinct disadvantage when litigation is necessitated over the interpretation of policy language.[35] If a decision occurs as to some existing policy terminology which broadens recovery, the insurance companies insert new phrases attempting to avoid the effect of this decision. This suffices until a court interprets this new terminology to still allow recovery. Whereupon a new change is made in the policy terminology to again attempt to abrogate the effect of the court's holding. It is this practice of awaiting a decision and then inserting new language to attempt to change or obviate the court-imposed broadened liability which to me subjects us to the criticism directed at the young attorney spoken of by Mr. Van Schaick—that we are starting at the wrong end. Instead of awaiting a decision, then altering that fragment of policy language involved, why shouldn't we attempt to anticipate the effect of our present terminology, to reappraise it and to change it, if need be, in the light of the motivating factors which underlie the court's decisions in this field of policy interpretation?

In this respect lie the importance of past decisions. Certainly not all policy terminology subject to interpretation has been involved in litigation, but a consideration of the elements motivating the courts in these past decisions should enable us to intelligently determine if our policy language is beyond reproach.

A policy of insurance is a contract, and the parties thereto have a right to agree on whatever terms they wish. Courts must accept the contracts as they find them and are unable to remake for the parties a better agreement than they made for themselves. But insurance forms are drafted in advance by the insurer without consulting the insured. Therefore it is universally agreed that the policies are to be liberally construed in favor of the insured and all uncertainty or ambiguity is to be resolved against the insurer.[36] The intention of the parties must be given effect, and the intention is to be determined from the subject matter, the expressions used, the purpose sought, and the situation of the parties. As Mr. Justice Cardozo said, and has been affirmed or referred to many times, policies of insurance are to be construed not in the language of the actuary, the accountant, or the attorney but in the language of the man in the street.[37] In the final analysis the test is said to be what a reasonable man in the position of the insured would have understood the words of the policy to mean and not what the insurer intended them to mean.

[34]Felix, *Injury by Accidental Means*, 1947 Ins. L.J. 917; 7 Fed. Insur. Counsel, No. 2 p. 10 (1957); 25 Va. L. Rev. 710 (1939).

[35]Hudon, *Insuring and Exclusion Clauses in Individual Accident and Health Policies*, 1958 Ins. L.J. 135.

[36]Hudon, *supra* at 149; 13 Appleman, Insurance §§7381-7388, 7435-7440 (1943).

[37]*Pilot Life Insurance Co. v. Morgan*, 2 CCH Life Cases (2d) 1251 (Ga. Ct. App. 1956); 7 Fed. Insur. Counsel, No. 2 p. 10 (1957); 91 Univ. Pa. L. Rev. 362 (1942); 25 Va. L. Rev. 710 (1939).

These principles of construction are not new, for actually they form the battlefield of every policy construction case. They are, however, of little or no assistance in predicting future results. In view of the conflicting opinions in this multiplicity of cases, it is apparent that these rules of construction are merely labels placed on a result. Courts may reach diametrically opposed results in a policy interpretation case with similar facts, but each court will justify its decision with the settled rules of construction.

Just when will a court find that an ambiguity exists, and thereby impose liability upon the insurer? When will the policy be deemed to be capable of two interpretations and the one favoring coverage adopted? When will the language be so clear and unambiguous that the court must accept the policy as it is written, leaving the parties to the bargain they agreed upon?

We have long been aware of the basis of a court's action in a policy interpretation case, though perhaps in a different connection. Why is an insurance company at a distinct disadvantage when it goes into court resisting liability? It is because the courts recognize that the very purpose of accident and health insurance is to protect the insured. They feel, perhaps understandably so in some cases, that there is an unjustified attempt by the insurer in the purported delineation of its risk assumed to make recovery the rare exception. If all hazards are excluded from coverage, there would be little left to an accident policy but the opportunity to take premiums. The accepted rules of construction have served to assure that the general purpose of accident insurance is not defeated, but whether this takes place to a greater or lesser degree depends upon how the rules are applied, and that may vary from court to court.[28]

The insurance companies' reactions to the courts' decisions in this area are that they are being forced to pay for risks not covered by the policy; that the premiums were calculated on an assumption that certain risks were beyond the limit of the policy; that the insured is being given something to which he is not justly entitled by the terms of the agreement. The courts' response to this argument is that since the insurance company frames the policy, it may cure this defect by changing the words in the policy. However, the ability of a company to do this is limited by the fact that the saleability of the policy may be affected by encumbering the policy with numerous exceptions and exclusions.

This, then, is the dilemma of the insurance company — from a perspective standpoint it must delineate the risk assumed by the coverage and exclusion clauses in order to obviate the possibility of having the courts impose liability upon it not contemplated by the original agreement; from a practical standpoint the insurers do not want to affect the saleability of a policy by having unnecessary language in it which will be immaterial to their legal obligation. Here is the opportunity for the needed re-appraisal of language now being used in accident and health insurance. The risks which are to be covered or excluded should be clearly and explicitly set forth by the policy language—this being limited by the practicalities of saleability. If this is not done, or if business practicality makes it impossible, there is the ever-present risk of having liability imposed for a risk not intended to be assumed under the guise of the settled principles of construction of insurance policy language.

With these factors in mind, a consideration of several recent decisions is more meaningful. In *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co. of North America*[29] the plaintiff corporation was insured under the defendant's comprehensive liability policy, providing indemnity for sums paid as damages "because of bodily injury, sickness or disease . . . sustained by any person and *caused by accident.*" An employee of a licensee of plaintiff recovered for radium poisoning contracted over a seven month period of work with radio-active material furnished by the plaintiff corporation. In a subsequent suit by the plaintiff against its insurer, it was held that the meaning of "accident" was ambiguius and that the interpretation most favorable to the insured should be adopted. Thus the radio active poisoning contracted over a seven month period was held to be an "accident." The insurance company in this case was put on notice of the risk in-

[28]Hudon, *Insuring and Exclusion Clauses in Individual Accident and Health Policies*, 1958 Ins. L.J. 135.

[29]411 Ill. 325, 140 N.E. 2d 250 (1952).

volved merely by the name of the insured corporation, Canadian Radium & Uranium Corporation. Certainly the company could and should have specifically excluded such risk of injury from radioactivity from its comprehensive liability policy. If the insurance company made a conscious decision to risk the absence of such a specific exclusion, in the interest of saleability, it was a bad choice.

A calculated risk by the insurance company did succeed in *Fotz v. Moore McCormick Lines, Inc.*[40] in which the policy contained an exclusionary clause preventing recovery if the insured "has physically present in his body intoxicating liquors in any degree." Although there was no casual connection between the intoxication in the insured's body and the injury resulting, the circuit court, reversing the district court, refused to allow recovery. Apparently this terminology was designed to replace the old exclusionary clause, "injuries sustained while under the *influence* of intoxicating liquors." Certainly the court's decision is an obvious hardship to the "one drink man", and the company took a risk in not clearly stating in the policy that it was immaterial whether the insured was under the influence of alcohol or whether the intoxicant contributed to the accident, or increased the risk. The insurance company, however, did include the phrase, "in any degree," which probably made the policy more saleable than would a more explicit phrase. This attempt by the insurance company proved to be enough to offset the tendency of the court to so construe the policy as to increase the coverage thereof.

Interpreting the language of policies in the light of the use and understanding of the average man may operate to limit the coverage of the policy. In *Willingham v. Life & Casualty Insurance Company of Tennessee*[41] the husband of the plaintiff jumped or was thrown from an airplane about fifty feet above the ground and was killed. An exclusionary clause in the policy denied liability if the injury or death was caused by "riding in, or descending from" aircraft. The plaintiff contended that the death was not caused by "riding in, or descending from" an aircraft, but was caused by striking the ground. The court refused to make such an absurd construction of the policy and held the language was unambiguous. It was apparent that the insured in this instant had received the coverage for which he had paid and that the insurance company had specifically excluded this risk from the limits of the policy.

However, not all courts have been so hesitant to pervert the policy language. In *Massachusetts Mutual Life Insurance Co. v. Smith*,[42] for example, the court held that the death of a person caused in the crash of an airplane shot down by an enemy submarine did not result from "operating, or riding in any aircraft." The policy in that case did not contain a war exclusion clause, probably because the war had just begun. The risk imposed upon the company by this decision could have been specifically excluded without loss of saleability, and indeed practically all policies did so immediately after this decision.

This case illustrates that a periodic reappraisal of policy language is needed—for the mere fact of passage of time and the occurrence of a condition, not present when the policy was issued, was the basis of the imposition of liability by the court. Other examples of the effect of changing conditions upon the interpretation of policy language are the recent cases construing the war-exclusion clauses in relation to the Korean conflict. In *Christensen v. Sterling Insurance Co.*[43] recovery was denied, the court giving the ordinary popular meaning to the term "war" despite the fact that no war existed in a strict sense. The court held, and rightly so, that the mere presence of a formal declaration of war by the Congress did not increase or decrease the risk. There have been contrary decisions and several insurance companies in the light of these decisions have amended their war exclusion clauses to except from coverage injuries or deaths resulting out of "war, declared or undeclared." Since this clause may be added without loss of saleability, it seems a wise decision.

Even considering the policy interpretation decisions in the light of the factors

[40]189 F. 2d 537 (2d Civ. 1951); 45 A.L.R. 1521 (1926).

[41]*Willingham v. Life & Casualty Co. of Tenn.* 2 CCH Life Cases (2d) 55 (5th Civ. 1954).

[42]193 F. 2d 511 (5th Civ. 1952); *Bull v. Sun Life Assurance Co. of Canada*, 141 F. 2d 456 (7th Civ. 1944).

[43]*Christensen v. Sterling Insurance Co.*, 2 CCH Life Cases (2d) 435 (Wash. Ct. App. 1955).

motivating the courts, it is impossible to explain all of the inconsistencies, the obscurities and the conflicting opinions. Occasionally cases occur which impose liability upon the insurance company even though the insurer has delineated the risk assumed as clearly and explicitly as possible. For example, in *Tenrose v. Commercial Travelers Insurance Co.*[44] the policy did not define the term "necessarily and continuously confined within the house." The court held that substantial compliance would suffice; therefore the fact that the insured had left the house to see his physician, to attend church, and to direct his boys as to the plowing, did not operate to cut off his disability benefits. The policy did specify, however, that "regular attendance of a legally qualified physician" meant visits of or personal treatments by such physician at least once every seven days. Surprisingly, the same court held that a substantial compliance with this provision was sufficient also, and that evidence of a fewer number of visits would suffice to enable the claimant to recover disability benefits. Further, in *Dixon v. Pacific Mutual Life Insurance Co.*[45] eight visits by a physician over a three month period would mean to be "necessary and regular attendance" by a physician.

[44]2 CCH Life Cases (2d) 65 (Idaho Sup. 1954); 107 A.L.R. 289 (1937).
[45]3 CCH Life Cases (2d) 372 (U. S. Dist. Ct. N. Y. 1957).

Such decisions as these appear to go far beyond any attempt to interpret the policy language in the meaning of a reasonable man in the position of the insured. This confusion and the lack of uniformity, however, are the limits within which we all must work—in examining claims, in determining their merit or validity, in ascertaining their settlement value, or in preparing for the defense of the claim in prospective litigation. To be as fair as possible to ourselves, we should reappraise the language of our present accident and health insurance policies. Let us recognize that the court will construe this language most strongly in favor of the insured to prevent insurance companies from soliciting policies, collecting premiums and escaping liability for advertised coverage on a technical basis. Let us balance this factor against the possible loss of sale value of policies if we include more specific and express exclusion clauses in them.

This is a choice which we have always made, but let us now do so knowingly. Let us examine the policy language, and if we may clearly specify an exclusion from coverage without loss of saleability, we should do so. If the factors of business practicality and saleability of the policy prevent us from more clearly delineating the risk assumed, at least let us make this choice consciously and be aware of its possible consequences.

The Loaned Employee Doctrine As Applied To Workmen's Compensation Cases*

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LET US assume that a house is being built. There may be present on the job at times employees of the architect or designer, carpenters, cabinet makers, roofers, plumbers, heating engineers, bricklayers, painters, paper hangers, and general laborers. In addition there may be found on the job site employees of the various suppliers of material. Six or seven distinct groups of skilled laborers may be required to do what one "jack-of-all-trades" accomplished alone in the past. Necessarily these laborers must work together closely to produce the end result. If the foregoing example is magnified many times, as in the construction of a large dam or bridge, it will readily be seen that many business firms will be involved whose workers are like bees at the hive, comingling at once. While going about their various jobs it is quite probable that employees of one will assist those of another in the work performed. Thus, of manifest importance is the application of the common law doctrine of the loaned employee under our Workmen's Compensation laws.

Dual Employment

The loaned employee doctrine is a doctrine of law arising from circumstances where the general employer agrees to loan an employee,[1] with the employee's consent, either express or implied to a special employer for a specific task, reserving in the general employer the right to the return of the employee's services at the termination of the special task, whereby the special employer has the right to control the details of the services and where the services being done are essentially for the benefit of the special employer. By definition then, the loaned employee doctrine declares that under the foregoing circumstances the special employer may become liable for workmen's compensation payments in case of injury to the employee.

There may be a dual employment where the employee is under contract of hire to two different employers or where the employee's services are separable as to each employer or may be identified with one employer or the other. Under these circumstances the employer for whom services are being rendered at the time of the injury is liable for compensation.[2] However, where the services are not separable and identifiable, or where both employers have a joint interest in the work being performed and each had joint control of services being rendered by the employee, each employer may be jointly liable for compensation payments.[3] Therefore these situations are to be distinguished from the true loaned employee doctrine.

The Rights To Be Protected

At common law, in the application of the loaned employee doctrine, the courts were more concerned with the rights of the two employers as to what they had agreed with regard to whose services were being performed by the employee, and little or no consideration was required as to the rights of the employee. However, with the advent of our compensation laws, which are considered as social legislation, the significant deviation from the common law principle in that such acts are primarily concerned with the protection of the rights of the employee or his

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[1] *Texas Employers Ins. Assn. v. Neely* (Texas, 1945), 189 S.W. 2d 626.

[2] *Murphy Supply Co. v. Frederickson* (Wis., 1931), 239 N.W. 420; *Vaught v. Texas Employers Ins. Assn.* (Texas, 1953), 257 S.W. 2d 445.

[3] *Johnston v. International Freighting Corp.* (N.Y. 1949), 87 N.Y.S. 2d 297; *Famous Players-Lasky Corp. v. Ind. Comm.* (Cal., 1924), 228 Pac. 5, 34 A.I.R. 765; *Standard Accident Ins. Co. v. Ind. Accid. Comm.* (Cal., 1932), 11 P. 2d 401; *Rice v. Keystone View Co.* (Minn., 1941), 297 N.W. 841; *Jackson Trucking Co., Inc. v. Interstate Motor Freight System* (Ind., 1952), 104 N.E. 2d 575.

heirs. The courts are generally more liberal in their construction and application of the workmen's compensation acts than they are in the application of the common law, and there is apparently a tendency to permit the injured employee to recover compensation in any case in which the desired result may be obtained without working an injustice to the other interested parties.[4] This has led to the emphasis being cast upon the rights of the employee, as to whether or not he has consented to the special employment, or whether or not he has entered into an express or implied contract of employment with the special master. An employee is not a chattel and cannot be shuttled between employers without his consent. This is necessarily true since an employee loses certain rights along with those he gains when he strikes up a new employment. If he consents to his services being loaned to a special employer, he may relinquish a third party action at common law against the special employer.[5] In some instances he may be depriving himself of a known compensation insurance coverage of his general employer for some unknown security. By the same token, he may be improving his employment status as to compensation and other fringe benefits. In any event, he has the right to accept or reject the new employment.[6]

The result of the change of emphasis brought about by the adoption of the compensation law is such that, before the loaned employee doctrine will be applied, there must be a positive showing that the employee has agreed to such special employment either expressly or impliedly. Some jurisdictions, in order to provide a continuous compensation protection for the employee, have by legislation prohibited the application of the loaned employee doctrine.[7] These particular acts provide that the general employer remains liable under the compensation act notwithstanding the fact that the injured employee's services have been loaned temporarily to a special employer, with the employee's express consent. Some courts have construed particular compensation acts so as to render similar results. The Supreme Court of Iowa so held in *Hassenbroch v. Weaver Construction Company,* 67 N. W. 2nd 549 (Dec. 1954).

In other jurisdictions the courts have held both the general employer and the special employer liable for compensation payments where both employers had a right to control the details of the services and received benefit from the services of the employee. In such instances we can safely assume that the loaned employee doctrine was applied in order to hold the special employer liable. Among the first cases to recognize such theory is the case of the *Famous Players Lasky Corp. v. Industrial Accident Commission of California,* 1924, 228 Pac. 5, 34 A.L.R. 765. In this particular case the Famous Players Lasky Corporation was engaged in producing a motion picture film. Certain scenes were to be filmed near Pebble Beach, California, and it was desired to have planes fly near the camera during certain scenes to give the desired effect. A representative of the motion picture corporation communicated by phone with Williams Brothers Aircraft Corporation of San Francisco, which was primarily engaged in the business of manufacturing airplane accessories, and which had a few airplanes in stock at its place, used mainly for experimental flight in testing devices. They had no pilots on their staff, but at the request of Lasky Corporation they agreed to furnish two airplanes and to find pilots, for a total charge of $80.00 per day for the planes and pilots. They accordingly sent the airplanes, each with a pilot, one of whom was Pugh, the claimant herein. The only direction given the pilots by Williams Brothers was that they were to fly from the San Carlos Field to a polo field at or near Del Monte, where they were to report to the Lasky Corporation for instructions. After some delay the pilots were taken to Pebble Beach by Lasky Corporation and requested to look through the camera, get its range of vision, and to direct their flight according, so as to come within camera range. This was done, but after making one trial flight they were directed to fly further out and lower in order to be in the picture. It was Pugh's better judgment that this would be dangerous, but he yielded to the request of the representative of Lasky Corporation. However, while mak-

[4] 58 Am. Jur., sec. 343; 3 A.L.R. 1181.

[5] *Scott v. Savannah Elec. & Power Co.* (Ga., 1951), 66 S.E. 2d 179; *Bright v. Bragg* (Kan., 1953), 264 P. 2d 494; *Stuyvesant Corp. v. Waterhouse* (Fla., 1954), 74 So. 2d 554.

[6] *Southern Cal. Iron & Steel Co. v. Amalgamated Assn.* (Cal., 1921), 200 Pac. 1.

[7] G. S. Conn., sec. 7424 (1949); 6 Edw. VII (1906) Ch. 58, Sec. 13.

ing the second flight, Pugh crashed, killing a representative of Williams Brothers who was a passenger, and seriously injuring himself. It would seem that Williams Aircraft Corporation did not exercise any control or discretion over either of the pilots as to time, place or method. The court found that while the representative of Williams Aircraft Company might have vetoed the instructions given by Players Lasky Corporation, they did not do so, but rather tacitly concurred therewith; and further, that the pilots, after demurring as between themselves as to the lower flight and after conferring among themselves and with the representatives of the general employers, followed the instructions of the special employer. They held that the doctrine should be applied when the relation of both a general and special employer is shown to exist, and that the award might be sustained as against both.[8]

When Doctrine Applies

In those jurisdictions where the doctrine has been applied, or where there has been no restriction by legislation or judicial interpretation, the courts have permitted the application of the doctrine in some instances, under certain factual situations, and rejected the doctrine under other factual situations. It is difficult to determine a general pattern or trend from the cases inasmuch as the courts seem to have reached different conclusions under similar factual situations. At the beginning of any loaned employee problem, it should be recognized that there will be a continuance of the general employment. It is certainly reasonable to insist upon a clear factual showing to the effect that a new temporary employment has been added to such general employment. The weight of authority seems to indicate that the necessary requirements for the application of the doctrine are: (1) a contract of employment or hire between the special employer and the employee, either express or implied; (2) the work being done must be essentially that of the special employer; (3) the special employer must have the right to control the details of the work.

In the case of *Seaman Body Corp. v. Industrial Commission* (1931), 204 Wis. 157, 234 N. W. 433, the court said:

> "The relation of employer and employee exists as between a special employer to whom an employee is loaned whenever the following facts concur: (a) consent on the part of the employee to work for a special employer; (b) actual entry by the employee upon the work of and for the special employer pursuant to an expressed or implied contract so to do; (c) power of the special employer to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue. The vital questions in controversies of this kind are: (1) Could the employee actually or impliedly consent to the work for the special employer? (2) Whose was the work he was performing at the time of the injury? (3) Whose was the right to control the details of the work being performed? (4) For whose benefit primarily was the work being done?"

The court pointed out that in such cases the burden to compensate is placed upon the special employer whose work is being performed, upon the industry in which the employee is engaged and which is being primarily promoted.[9]

When Is One An Agent?

The writer will endeavor to discuss the three elements individually as they have been applied in the various jurisdictions. The writer has briefly discussed the necessity of the consent of the employee in distinguishing the application of the doctrine as between common law principles and under workmen's compensation cases, and how the compensation laws have changed the emphasis of the law from

[8] *National Auto Ins. Co. v. Ind. Accid. Comm.* (Cal., 1934), 32 P. 2d 356; *Silberman v. Ind. Accid. Comm.* (Cal., 1943), 134 P. 2d 228; *Lloyd Corp. v. Ind. Accid. Comm.* (Cal., 1943), 142 P. 2d 754; *Mendel v. Ft. Scott Hydraulic Cement Co.* (Kan., 1938), 78 P. 2d 868; *Bright v. Bragg, supra; Wright v. Cane Run Petroleum Co.* (Ky., 1935), 90 S.W. 2d 36; *Wing v. Clark Equipment Co.* (Mich., 1938), 282 N.W. 170; *McDonald v. N.Y.* (N.Y., 1943), 39 N.Y.S. 2d 2; *Lunday v. Dept. of Labor & Industries* (Wash., 1939), 94 P. 2d 744; *American Surety Co. v. Northern Trust Co.* (Wis., 1942), 2 N.W. 2d 850; *Scott v. Savannah Elec. & Power Co., supra.*

[9] *Gen. Accident, Fire & Life Assur. Corp. v. Ind. Accid. Comm.*, (Cal., 1937), 64 P. 2d 783; *Carnes v. Ind. Comm.* (Ariz., 1952), 240 P. 2d 536; *Cook v. Buffalo Gen. Hospital* (N.Y., 1955), 127 N.E. 2d 66; *Stuyvesant Corp. v. Waterhouse, supra; Combustion Eng. Co. (Raymond Pulverizer Div.) v. Ind. Comm.* (Wis., 1948), 35 N.W. 2d 317.

the employer to the employee. The necessity for the employee's consent to the new employment relation stems from statutory requirement of the contract of hire and is the principal distinction to the tests applied at common law.[10] Consent of the employee is one of the necessary elements in determining as employer-employee relationship, insofar as the loaned servant doctrine is concerned. However, there are other elements recognized at common law which are also essential in the final determination of an employer-employee relationship. Without going into great detail, it can be said that practically every court would agree to the definition and tests that are given in the Restatement of the Law of Agency, Vol. 1, Sec. 220, p. 483:

"Definition.

"(1) a servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

"(a) The extent of control which, by the agreement, the master may exercise over the details of the work;

"(b) whether or not the one employed is engaged in a distinct occupation or business;

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer; and

"(i) whether or not the parties believe they are creating the relationship of master and servant."

Certainly every employee has the right to consent to or reject a contract of employment. Consent to or the agreement with the new, special employer may be either express or implied. Of course the courts would have no trouble at all where the employee expressly consents to a new arrangement and where he has full knowledge of his new master. However, the difficulty arises from the term "implied consent" and the various interpretations placed thereon.

Consent of Employee

Consent has been defined in general terms in the following manner:

> "Consent is manifest by action or by inaction, or by silence, from which arises an inference that consent has been given."[12]
>
> "Consent is a thinking together, and agreement of one with another to the doing of something, or permitting some act or deed or course of conduct. It need not be written but may be spoken or acted or may be implied."[13]

Consent to a new contract of employment has been implied in many jurisdictions where there has been no statute prohibiting application of the loaned employee doctrine and even in those states that hold either or both employers liable for compensation. Consent may be implied by the actions of the employee where he has notice of the new arrangement and submits to the control and supervision by the new employer, or where the work being done is that of a special employer.[14]

It is of interest to note the holdings of some of the courts in recent cases. In the case of *Stuyvesant Corp. v. Waterhouse*

[10] *Pocrnich v. Snyder Mining Co.* (Minn., 1951), 45 N.W. 2d 794; *Shamburg v. Shamburg,* (Neb., 1950), 45 N.W. 2d 446; *Gibson v. Skelly Oil Co.* (5 Cir., 1946), 152 F. 2d 588; *Gonyea v. Duluth Missabe & Iron Range Ry. Co.* (Minn., 1945), 19 N.W. 2d 384; *Emack's Case* (Mass., 1919), 123 N.E. 86.

[11] *Dahl v. Wunderlich* (Minn., 1935), 259 N.W. 399; *Wilson & Co. v. Locke* (2 Cir., 1931), 50 F. 2d 81; *Miller v. National Chair Co.* (N.J., 1941), 18 A. 2d 847; *Doyle v. Comm.* (Pa., 1943), 34 A. 2d 812.

[12] *In Re Hudson Co.* (N.J.), 106 N.J.L. 62, 144 A. 169.

[13] *Richardson v. Richardson,* (N.Y.), 114 N.Y.S. 912.

[14] *Pocrnich v. Snyder, supra; Cayle v. Ind. Comm.* (Wis., 1920), 179 N.W. 771; *Torseys Case* (Me., 1931), 153 A. 807; *Knudson v. Jackson* (Iowa, 1921), 183 N.W. 391.

(Sup. Ct. Fla., 1954), 74 So. 554, the court states:

"Where managers of adjoining hotels had entered into arrangements for beach boys employed by each hotel to participate in water shows presented by the other hotel, operator of hotel presenting show upon its premises, with its equipment and under its direction, was liable for workmen's compensation on account of injuries sustained by beach boy employed by adjoining hotel while participating in show, since particular work being done by beach boy at the time of injury was essentially that of hotel presenting show and such hotel had right to control details of such work, and hence a contract of hire between such hotel and beach boys must be implied as a matter of law."

Further, the Supreme Court of Minnesota has adopted a similar rule in the case of *Pocrnich v. Snyder Mining Co.*, (Sup. Ct. Minn., 1951), 45 N. W. 2d 794:

"Where relationship of master and servant exists, such relationship cannot be terminated by employer loaning employee to another so as to constitute the latter instead of the former the employer, unless such transfer be made with the knowledge of such employee, and with his consent thereto, either express or implied.

"Where deceased, employed by one employer for 18 years, was requested by such employer's foreman to work for a new employer on a temporary basis for at least the same wages, and it was made clear to him that such transfer was to be only with his consent, and thereafter such employee transferred to the new employer, took instructions from him, and otherwise clearly manifested his knowledge of the new employer-employee relationship and his consent thereto, held that such evidence was sufficient to sustain finding of industrial commission that at time of employee's death, while performing services for the new employer, the latter was responsible therefor under the Compensation Act."

The case of *Bright v. Bragg* (Sup. Ct. Kansas, 1953), 264 P. 2d 494, is an action by a workman of the seller against the buyer for injuries sustained when metal which the workman had unloaded at the buyer's plant, under the buyer's direction and supervision, fell on the workman. The determinative question was whether or not the employee was an employee of the buyer as well as the seller. The parties conceded that the hauling, unloading and stacking were necessary to constitute a complete delivery. The court held that where the seller sold to the furnace company sheet metal to be delivered and unloaded on the furnace company's premises, the seller's workman being directed in his unloading work by the supervisor of the furnace company, and the workman following such directions without complaint, and the workman was injured when sheets of metal which had been stacked against wall fell on workman, the furnace company was a special employer of the workman with respect to work out of which injury arose. The workman could maintain a claim for compensation against the furnace company; and hence, his common law action for damages was precluded.

It may also be stated that in some jurisdictions, where the employee files a third party common law action against the special employer, the courts are hesitant to find a contract of employment or hire unless the employee has expressly agreed to the arrangement.[15] In these cases it is of interest to note that the Massachusetts courts have set forth the necessity of the absolute consent of the employee to the arrangement or to the new contract of employment with the special employer, even though they have not been willing to imply consent by the actions of the employee in undertaking the new employment.

In the case of *Shamburg v. Shamburg* (Neb. Sup. Ct. 1950), 45 N. W. 446, the court found that where one employee enters the new employer's service at the specific directions of a general employer, no new relationship is created. The consent necessary to shift the employer-employee relationship from general to special employer cannot be inferred from the fact that the employee obeyed the commands of the master.

[15] *Bright v. Bragg, supra; Stuyvesant Corp. v. Waterhouse, supra; Abbott v. Link Belt Co.*, (Mass. 1949), 88 N.E. 2d 551; *Longevins Case* (Mass., 1950) 91 N.E. 2d 920; *Sargentelli's Case* (Mass., 1954), 117 N.E. 2d 827; But consent will not be implied where he is unaware of a loaning agreement between the employers. *Texas Employers Ins. Assn. v. Neely, supra.*

Whenever a new employer has taken over without the employee's knowledge,[16] or where there has been a change in the ownership of the employer's business without the knowledge being imparted to the employee, the latter cannot be bound by a contract of employment of hire. In the latter instance it has been held that the employee may hold the general employer with whom he made his contract at least for a reasonable length of time until knowledge of the change may be imparted to him.[17]

The Test of Liability

Once it has been determined that there exists a contract of employment between the employee and the special employer, there remains the necessity of satisfying the objective requirement that the work being done be essentially that of the special employer. The courts are inclined to inquire both as to whether or not the work being done is that of the special employer and as to whether or not he has the right to control the details of the work. However, it should be pointed out that the requirement, that the work be essentially that of the special employer, has to do with the type of work and the benefit from same; whereas the right to control the work has to do with the direction of the employee in the details of the work being performed.

It has been said by an A.L.R. annotator:[18]

> "With respect to the application of the principles to Workmen's Compensation cases, the courts are agreed that the most influential elements are those of primary benefit to be derived from the work (whose work is being done) and the power of control of the manner of its execution."

In substance the annotator set out the two remaining tests which are necessary for the purpose of determining whether or not the loaned employee doctrine would apply.

It should be noted that where the loaned employee doctrine finds application, both of these tests (special employer's right to control the details of the work and the work being essentially that of the special employer) must be satisfied. It logically follows that in the absence of either or both, the loaned employee doctrine would not apply. Most courts have recognized that the general employment relationship does not cease merely because a special employment exists and the work being done is essentially that of the special employer and the special employer has the right to control the work. Thus for consideration of the workmen's compensation law, the loaned employee is the general employee of the general employer and the special employee of the special employer. Therefore, whatever may be said as to these tests (work being performed being essentially that of the special employer with the right to control such work), has not only to do with the questions of whether or not a special employment exists under the facts, but indirectly has to do with whether or not the original general employment is continued as contrasted to a new and substituted general employment.

Assuming, therefore, that temporary loaning of an employee's services has been arranged between employers, to which the employee has expressly or impliedly consented, it must next be determined from the particular facts whether or not the actual services being performed are for the particular benefit of the special employer.[19] The case of *Pacific Employers v. Liberty Mutual Ins. Co.*, 174 F. 2d 1, (5 Cir.), factually involved a death claim where the decedent, a dragline oiler and helper, was injured in attempting to crank a dragline motor, as instructed to do by the special employer's representative. The dragline machine and the service of its operator and those of the decedent had been specially loaned, but the evidence in the case showed that the cranking operation, although at the direction of the special employer's representative, was in the course of employment generally for the dragline operator, or else specially for the special employer, and that a proper determination of the issue by the jury's special verdict on the subject was decisive as to liability.

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[16] *Traders & Gen. Ins. Co. v. Jaques* (Texas, 1939) 131 S.W. 2d 133; *Ohio Farmers Ins. Co. of Leroy v. Borden* (Ind., 1951), 98 N.E. 2d 684.

[17] *Ledbetter v. Adams* (Ark., 1950), 230 S.W. 2d 21; *Palmer v. Main* (Ky., 1925), 272 S.W. 736; *Buchanan Mining Co. v. Henson* (Ky., 1929), 15 S.W. 2d 291; *Crow v. Hosier* (La., 1953), 66 So. 2d 380.

[18] 152 A.L.R. 821.

[19] *Iowa-Illinois Gas & Electric Co. v. Ind. Comm.* (Ill. 1950), 95 N.E. 2d 482.

"This brings us to the crucial point of the case. If the motor was cranked to ascertain whether or not it was fixed and ready for operation, as the last step in repairing it, then Walston was working for Dixon, his general employer, at the time of his injury; but if the motor was fixed, and the vacuum tank was filled with gas, and Walston was instructed by Prihoda to crank the motor for the purpose of resuming operations with the dragline; i.e., in order to begin digging again, it is clear that the deceased met his death in the performance of services for his special employer, Knutson Construction Company. Undoubtedly, Walston was at all times subject to some control by both his general and special employers; undoubtedly, his work in oiling, greasing, and repairing the machinery, filling the tank with gas, and similar tasks, was done for and on behalf of Dixon; but it is equally certain that, if he undertook to crank the motor for the operator to begin digging again, he was working for Knutson Construction Company."

In the case of *Jones et al., v. Getty Oil Co.*, 92 F. 2d 255 (10 Cir., 1937), the court used the following language:

"In determining whose work is being done, as test of whether workman becomes special employee of person for whose benefit workman's general employer directed work to be done, power to control work is merely evidentiary and not conclusive, though important, and identity of person who directs details of work and instructs workmen is unimportant compared to power of controlling work as a whole."

Following the same principles, the Supreme Court of Washington in the case of *McGrail v. Dept. of Labor and Industry*, 67 P. 2d 851, in an action for death benefits under the compensation act, stated in substance that whether or not the employee was in the course of the employment within the compensation act when injured depended on whether or not he was performing duties required of him by the employment contract, at the employer's specific direction or that he was engaged in the furtherance of the employer's interests at such time. Briefly, the facts were that the deceased contracted with the Highway Department to lease his truck which would be in operation at all times. During one shift he would drive the truck. He was paid for the truck separately, and for his services the same as other drivers. He was to keep the truck in repair on his own time. While returning from town, where he had gone for tires for the truck, he met his death. The case does not involve the loaned servant doctrine but turns on the question of the course of his employment. However, it is significant here in that it sets forth the rule as to what work is considered essentially to be that of the employer. The court concluded that the going to town for tires was not in the furtherance of his employer's interests but solely in the furtherance of his own interest as the owner and hirer of the truck.

And in the case of *American Stevedores Co. v. Industrial Commission* (Sup. Ct., Ill., 1951), 97 N.E. 2d 329, the court applied the principle.

The Supreme Court of Oklahoma in a 1954 death case set forth the test under consideration in *Crutchfield v. Melton*, 270 P. 2d 642, quoting from an earlier case, *Wylie-Stewart Machinery Co. v. Thomas*, 137 P. 2d 556, and stating:

"The cited case established, in this jurisdiction, the rule that the relationship is to be 'judged by the nature of the duty being performed by the servant at the time, and which of the two masters is exercising control.' The question to be answered in making the determination is—In the act which the servant was performing at the time, was he in the business of and subject to the direction of the temporary employer as to the details of such act?"

Benefits to Employer

It has been held in a number of jurisdictions, as has been previously stated herein, that both the employers may be liable for compensation where the evidence discloses the existence of rights in each to share in the control or the benefits of the work being performed.

It has been said by Larson in his work on compensation that:[20]

"Rescue and emergency cases are clear examples of the rule: the employer to whose land a neighboring employee rushes to help fight a fire or rescue a worker in peril is, as between the two

[20] *The Law of Workmen's Compensation*, Vol. 1, Sec. 48.21, by Larson.

employers, the exclusive beneficiary of the rescue services."

With this statement the writer cannot wholly agree. The statement is undoubtedly correct in that this may be an example of the rule or test of the work being essentially that of a special master; however, the emergency cases turn on the question of whether or not the relation of employer and employee has been shown. In Larson's statement, if the intent is to state that the loaned employee doctrine would apply under such circumstances, this must of necessity be predicated upon a contract of employment or hire, either express or implied. In the cases cited by him as authority, all the tests necessary for application of the contractual relation, either expressly or impliedly, and an actual loaning of the employee have been met. The rescue or emergency cases are usually thought of in the sense where one sees another in a place of peril and he immediately goes to his aid. If, under such circumstances, the employee was injured, even though the special master would derive the benefit or that the work being done was essentially that of the special master, it is doubtful that a new contract of employment or hire could be implied. Certainly if the rule as to implied contract, as set forth previously in this paper, were applied, there could be no contract. It would seem to the writer that the better rule to follow in such instances would be that as announced in the case of *Denton v. Young* (Sup. Ct. Okla. 1950), 226 P. 2d 406, wherein the court stated:

> "The first prerequisite to recover compensation under the Workmen's Compensation Act is that the relation of employer and employee be shown to exist at the time of the injury; and as to whether or not the facts as disclosed by the record establish the existence of such relation within the meaning of the act, is a question of law for the determination of this court on a petition to review and where it is determined that such relation does not exist between the parties an order of the State Industrial Commission awarding compensation will be vacated."

The facts in the case were that an employee of a construction company went to the aid of a Dolese Brothers Company employee who was pinned under the bed of a hydraulic dump truck and, while voluntarily acting in such emergency, was injured. The claim was filed under the workmen's compensation act against his employer who requested the commission to join Dolese Brothers as a party respondent under the theory of the loaned employee doctrine.

In summary, it would seem to the writer that there has been a general trend by the courts of most jurisdictions where the loaned employee doctrine has been applied, or where such application is not restricted by statutes or judicial interpretation, that one of the essential elements or tests has been and will continue to be whether or not the services being performed at the specific time of the injury is essentially work of the special employer, and from which he derives the principal benefit.

Control by Special Master

Having determined that there was a contract of hire between the special employer and the employee, either express or implied, and that the work being done was essentially that of the special employer, there remains only the question of whether or not the special master had the right to control the performance and details of the services.

In an Oklahoma case, *Okla. General Power Co. v. State Industrial Comm.* (Sup. Ct. 1925), 235 P. 1095, the court stated:

> "In determining in a particular act whether one is the servant of his original master or the person to whom he has been furnished, the test applicable is whether such servant continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired."

Further, in another case, *Wylie-Stewart Machinery Co. v. Thomas,* 137 P. 2d 556, the Oklahoma court stated as follows:

> "Servant lent by master to another for particular employment, although remaining general servant of master, must be dealt with as servant of one to whom he is lent, as regards anything done in the latter's employment."

In a later case,[21] the Oklahoma court applied the doctrine to a case where an employee of a principal contractor was loaned to a subcontractor to unload doors for

[21] *Byrne Doors v. Ind. Comm.*, 145 P. 2d 754.

the subcontractor, and the latter's representative was not present when the doors were unloaded and consequently did not direct how the work was to be done. There was evidence to the effect that on previous occasions, under similar circumstances, the superintendent of the subcontractor had been present and had directed the work, and that the foreman of the general contractor looked to him for such instructions. The court stated, in following the case of *Manahan Drilling Co. v. Wallace,* 67 P. 2d 1:

> "It is well settled that one who is the general servant of another may be loaned or hired by his master to another for some special services so as to become as to that service, the servant of such third person."

From the above cited cases it becomes apparent that the common law test pertaining to the right of control of the employee's services finds its application in the doctrine as applied to workmen's compensation. Some tests should be applied more diligently than others by the very nature of the loaned employee doctrine. The right to control the end result, or the finished product, as distinguished from the method of arriving at it, falls short of showing employment. One who borrows a truck and driver, for example, even though he may designate the cargo and the route to be taken, may not be deemed to have control of the employment.[22] The element of which employer pays the employee is of little significance in applying the loaned employee doctrine, because the net result is almost invariably that the special employer ultimately pays for the service received, either directly or indirectly.

Although the required degree of the right to control may vary between jurisdictions, the right to control not only the end result, but also the details of the work and the manner in which they are to be performed is singularly the most important element in resolving whether or not the loaned employee doctrine will be applied.

Schneider, in The Law of Compensation, states or defines the test:[23] "* * * the latter (special employer) may become liable to pay and indemnify when he is in the exclusive control and management of the work in which the injury is received."

The rule or test as to the right of control is stated in Am. Jur.[24] in the following manner: "* * * The general employer relinquishes the services and control of an employee so that the employee becomes for the time being subject to the supervision of another, the latter becomes liable for compensation for an injury sustained in the course of such work, and the general employer is absolved from liability thereof." It goes without stating that such statement is subject to the qualification that statutory provisions or judicial interpretation of a particular workmen's compensation act do not prohibit these results.

It has been stated by an annotator in A. L. R.:[25] "That in a majority of the cases involved it was the general employer who had the right to, and who did in fact exercise control and direction over the employee. Some cases have held that the employee must look for compensation to the employer under whose direction and control he was working at the time of the injury."

In the case of *Allen v. Kendall Mill Supply Co.* (Mich. 1943), 9 N. W. 2d 45, the court held that the determinative test of the existence of the master and servant relationship between an employee and his regular employer, or between him and another to whom he is allegedly loaned, is, whose is the work being done, the most important influential element being that of power to control the work.

Further, in *Torsey's* case (1931 Me.), 153 Atl. 807, "The test is whether, in the particular service in which he is engaged or requested to perform, he continues liable to the direction and control of the original master or becomes subject to that of the party to whom he is lent or hired."

The factual situation that seems to have arisen most frequently in loaned employee cases involves the general employment of hiring out or leasing heavy equipment and furnishing of employees to operate it. These cases are commonly referred to as "teamster cases." Many jurisdictions hold that the general employer is liable in such cases, and this is largely predi-

[22] *Turner v. Schumacher Motor Express* (Minn., 1950), 41 N.W. 2d 182; *Famous Players-Lasky Corp. v. Ind. Comm., supra; Jackson Trucking Co. v. Interstate Motor Freight System, supra; Bright v. Bragg, supra.*

[23] *The Law of Workmen's Compensation,* Second Edition, Vol. 1, sec. 24, by Schneider.

[24] 58 Am. Jur., sec. 343.

[25] 34 A.L.R. 769.

cated upon the tests which have been covered, or the fact that one of the essential tests is lacking. However, the courts in deciding this type of a case have more frequently determined that the special employer is lacking in the right to control the employee in the essential details of his work, the right to hire or fire, to determine how the work shall be done, or the right to stop or continue the work. Under these circumstances it has been held that the control remains in the general master and he is liable for compensation. This idea is also conceived from reasoning that the general employer would naturally reserve the control necessary to insure that his equipment is properly used, and that a substantial part of any such operator's duties would consist of the continued duty of maintenance of the equipment. Under these principles it can be said that most usually the courts are inclined to follow the rule that the employee remains under the control of the general employer and to find the general employer liable for compensation.[26]

One of the most prominent cases[27] holding contrary to the rule is the case of *Ellegood v. Brashear* (Mo. 1952), 162 S. W. 2d 628. In that case the court held the employee became the employee of the special employer for compensation purposes, where the general employer entered into an agreement with the latter, whereby the services of both the truck and driver were loaned, and where the employee continued to receive wages from the general employer who also retained the power of discharge. The employee consented to do the work of the hauler, entered upon the work pursuant to the arrangement, and continued to work under the complete control, direction and at the will of the hauler. It is to be noted, however, that in a recent case, *Hargis v. United Transports* (Mo. 1955), 274 P. 2d 339, where the employee was sent by his employer with a truck to haul automobiles for a carrier, but that carrier merely told him his destination, route and place of deliveries, and did not direct him in the manner of operating the truck, the employee was held not to be a borrowed employee of the carrier. Thus it would seem that the Missouri court still adheres to the rule committed in the *Ellegood* case, since the elements of the control of the details of the work were lacking in the latter case.

Massachusetts is committed to the loaned employee doctrine and has applied it in most instances; however, in the teamster cases the rule there is as follows: (*Langevin's* case, Mass. 1950, 91 N. E. 921.)

> "An exception to the foregoing general rule has been established in this Commonwealth. 'Drivers of horses, automobiles, locomotives and perhaps other vehicles of travel, when lent with the vehicles presumptively remain the servants of the general employer and are subject to his control in so far as pertains to the care, management and preservation of the property'."

In those jurisdictions where the courts have found that both employers are liable for compensation purposes, it may be said that the loaned employee doctrine has been applied as to the special employer, this being due to the fact that in order to so find, all of the tests as to the doctrine must have first been at least partly answered in the affirmative as to the special employment; otherwise the special employer would not be held liable at all. In those jurisdictions where the compensation act provides for a secondary liability as between the general contractor and the subcontractor, the courts may be inclined to apply such a provision to a borderline factual situation, and especially where all the elements of the loaned employee doctrine are not clearly present, thus making subcontractor primarily liable and the general contractor secondarily liable.

Use of Estoppel

In those jurisdictions where the act contains an estoppel provision, in substance providing that where an employer carries workmen's compensation insurance and

[26] *Ben Wolf Truck Lines v. Bailey* (Ind., 1936), 1 N.E. 2d 660; *Massolini v. Driscoll* (Conn., 1932), 159 A. 480; *Finn v. Phillipip* (Minn., 1941), 300 N.W. 441; *Palm v. Southwest Missouri Wholesale Liquor Co.* (Mo., 1943), 176 S.W. 2d 528; *Uland v. Little* (Ind., 1948), 82 N.E. 2d 536; *Campbell v. Connolly Contracting Co.* (Minn., 1930), 229 N.W. 561.

[27] *Brazeale v. State Ind. Accid. Comm.* (Ore., 1951) 227 P. 2d 804; *Turner v. Schumacher Motor Express, Inc., supra; Sothern Underwriters v. Wilks* (Texas, 1937), 110 S.W. 2d 252; *Brown v. Arrington Construction Co.* (Idaho, 1953), 262 P. 2d 789; *Insurors Indemnity & Ins. Co. v. Pridgen* (Texas, 1949), 217 S.W. 2d 176; *Wall v. Penn Lumber and Mill Works* (Pa., 1952), 90 A. 2d 273.

the employee's salary is taken into consideration for the basis of premiums, and that such employer and insurer will be estopped to deny that the employment is hazardous, some problems as to the application of the loaned employee doctrine may arise. In a recent case in Oklahoma, *Ishmael v. Henderson* (Okl. 1955), 286 P. 2d 265, the court stated:

> "Where an employer is engaged in the business of furnishing or hiring out roustabout labor and hires and pays laborers for that purpose, and purchases workmen's compensation insurance policy to cover such laborers, and one of such laborers, whose wages had been included in determining the premiums paid on such insurance policy, suffers injury while working on the premises of and under direction of party to whom laborer had been furnished by employer, such injury arises out of and in the course of laborer's employment with hiring employer, and such contract of insurance becomes a contract for the benefit of such laborer which can be enforced by State Industrial Commission in making awards for death resulting from such injury."

Similarly, in an Arizona case, *Carnes v. Industrial Commission*, 240 P. 2d 536, where the court found that the loaned servant doctrine applied, stated in regard to the compensation insurance:

> "Where corporation utilized services of loaned employee, who was killed in accident arising out of employment, but did not pay any compensation insurance premiums on employee or report him as being employee, though corporation filled out accident report on employee's death on form appropriate for regular employee but failed to file report on representation of representative of industrial commission that it was not necessary as deceased was employee of regular employer, there was not sufficient lack of good faith to prevent beneficiaries of deceased from recovering workmen's compensation from the industrial commission fund."

It may also be said that one who is not otherwise subject to the compensation act does not merely by the borrowing of an employee from another employer that is subject to the compensation act, become liable to pay compensation for an injury sustained by the borrowed employee.[28]

It should also be noted that in some jurisdictions the payment of compensation by the general employer would toll the running of the statute of limitations so as not to bar a subsequent claim for compensation as against the special employer, where the loaned employee doctrine is applied, notwithstanding that the special master was without notice of the claim or the payments made by the general employer.[29]

It has been almost universally held that a determination by an industrial commission or other administrative body, that a situation of loaned employment exists or does not exist under the rules herein discussed as applied to the particular facts, will not be overturned on appeal if supported by any reasonable evidence in the record.[30]

Conclusion

In conclusion, it may be fairly stated that if from the facts of a given case it can be determined that: (a) an express or implied contract of employment exists between the special employer and the employee, (b) that the employee actually entered upon the work, and the work was essentially that of the special employer and (c) that there existed in the special employer the power to control the details of the work to be performed, to determine how the work should be done, and whether or not it should stop or continue, then the courts would generally hold the special employer liable for compensation either solely or jointly with the general employer by application of the loaned employee doctrine, except in those jurisdictions which have by statute or judicial decision rendered the loaned employee doctrine inapplicable to workmen's compensation cases.

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[28] *Ocean Accident & Guarantee Corp. v. Paulsen* (Wis., 1943), 12 N.W. 2d 129, 152 A.L.R. 810.

[29] *Compensation Ins. Fund v. Ind. Accident Comm.* (Cal., 1946), 66 P. 2d 310; *Cook v. Buffalo Gen. Hospital, supra.*

[30] *Allen-Garcia Co. v. Ind. Comm.* (Ill., 1929), 166 N.E. 78; *Fransen Construction Co. v. Ind. Comm.* (Ill., 1943), 52 N.E. 2d 241; *Department of Water & Power v. Ind. Accid. Comm.* (Cal., 1933), 24 P. 2d 866; *Byrne Doors v. Ind. Comm., supra; Louisville Cooperage Co. v. Bailey* (Ky., 1938), 116 S.W. 2d 643; *Gates' Case* (Mass., 1937), 8 N.E. 2d 12; *Northern Trust Co. v. Ind. Comm.* (Wis., 1939), 285 N.W. 339.

OF LAW AND MEDICINE

Medicolegal subjects, the doctor-lawyer relationship, medical evidence, expert medical testimony, medical malpractice and its trends, and similar topics, will be presented in this department. The Journal will be pleased to have its readers submit articles of this type, either written by them or which may come to their attention.

The Extension Of Tort Liability In The Field Of Pre-Natal Injuries*

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WITH the present rapid advance in the field of medical science, the legal profession will be called upon increasingly to apply such newly developed areas of knowledge to the logical and just determination of disputes arising out of our social relationships in this modern age. This is forcefully and dramatically demonstrated in the study given in the succeeding paragraphs on the theme expressed in the title of this article.

The Issue Stated

Is recovery to be allowed for harm or death to an unborn child?

The answer to this question is changing and has been changing rapidly in the past decade. At the present time it is one of the most dynamic questions in the field of negligence law. For some in whose jurisdictions the law has alredy changed, this article can only sound an alert to changes that might be expected to develop in other closely related fields. For those in jurisdictions where appellate courts have not recently reviewed the problem, perhaps these paragraphs can serve as a springboard in your research and study of the issue.

*Paper supplied by the Automobile Insurance Committee.

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The Traditional Answer

The traditional answer to the question first found expression in America in the case of *Dietrich v. Northampton*, 138 Mass. 14, 52 Atl. 242 (1884). In that case, Justice Holmes stated that there was no common law support for allowing an unborn child who died at birth to pursue an action for damages through his personal representative. This decision was subsequently followed by an overwhelming majority of states whose appellate courts considered the problem. Notably among these early decisions were *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900), with a vigorous dissent by Boggs, J.; *Drobner v. Peters*, 232 N.Y. 220, 133 N. E. 567 (1921) with Cardozo, J. dissenting; *Berlin v. J. C. Penny Co., Inc.*, 339 Pa. 547, 16 A. 2d. 28 (1940) and *Stemmer v. Kline*, 128 N.J.L. 455, 26 A. 2d. 489 (1942), Chief Justice Brogran dissenting. There are other cases, all of which are documented in 19 N.A.C.C.A. Law Journal 230, 10 A.L.R. 2d. 1051 and 27 A.L.R. 2d. 1250. The early majority view was promulgated and adopted by the American Law Institute Restatement, Torts, Section 869 in the following language:

"HARM TO UNBORN CHILD.
A PERSON WHO NEGLIGENTLY CAUSES HARM TO AN UNBORN

CHILD IS NOT LIABLE TO SUCH CHILD FOR THE HARM.

"Comment:

"A. The rule stated in this Section is applicable only to unintended harms to the mother or to the child. It prevents recovery by the child after its birth for any of the consequences of negligent conduct before birth. On the other hand, in an action by the mother for a tort which has caused her physical harm, damages can be included for the pain, suffering and mental distress caused by the death of the child before birth or immediately afterwards.

"A person designated by statute to maintain an action for causing death can not maintain an action for a negligent act committed before the birth of a child which causes the death of the child either before or after birth."

In most of the cases studied, the rationale in denying recovery has been that the child and mother are considered but one person, or that the common law does not recognize the right of recovery aside from legislative enactment permitting it, or the character of the evidence to show causation is too speculative, controversial and opens the door to fraud. In some cases all three elements form a part of the decision denying allowance of the right.

First Indications Of Dissatisfaction

The trend away from the traditional rule denying recovery in cases involving harm or death to an unborn infant was fostered first in the dissent of Justice Boggs in *Allaire v. St. Luke's Hospital, supra,* at page 640. He there stated that the argument that an unborn child was but part of the mother and had no separate being or existence which could be subject to injury distinct from the mother was untenable in view of the advances of medical knowledge at that time. It is noted that this dissent was written in 1900.

Forty-two years elapsed before dissatisfaction with the rule again achieved prominence in an American jurisdiction. This time it was in the dissenting opinion of Chief Justice Brogran in the case of *Stemmer v. Kline, supra,* at page 686. The following excerpt from his dissent has frequently been quoted:

"If the common law protects the rights of the unborn child and if every intendment in the law is favorable to him, the inference is inevitable that such unborn child is a person and possesses the rights that inhere in a person even though he is incapable himself to assert them. If the unborn child may not legally be deprived of his life it is hard to understand how that life may with impunity be totally impaired by the tort of a third person."

After reviewing the cases from other jurisdictions denying recovery, Chief Justice Brogran concluded that "the real reasons for these holdings, we think and it is not at all concealed in some of the opinions, is a rule of convenience. There would be many cases, it is feared, that would be founded on fraud and injustice might result from them; but these reasons should not weigh with the court". His dissenting opinion further noted that the interval between the act and the injury has no consequence except as to its evidental value on the question of cause and effect.

The first successful litigation, of what is now becoming a major expansion of tort liability in this field, was in the case of *Montreal Tramways v. Leveille,* 4 Dom. L. R. 337 (1933). The Canadian Court in its opinion on page 345 suggested still another reason for permitting such recovery:

"If a child after birth has no right of action for pre-natal injuries, we have a wrong for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation can not be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."

Despite this favorable decision allowing recovery from a neighboring Canadian jurisdiction, the law in the United States remained in the status quo until 1946.

The Changing Approach

The first American case recognizing the existence of a cause of action for pre-natal injuries was *Bonbrest v. Kotz,* 65 F. Supp. 138 (D.C.D.C., 1946). After a reexamination of the cases on the subject, the court concluded that a child was entitled to maintain an action for injuries sustained through alleged malpractice in removal from its mother's womb. The view that a child is to be considered part of its mother until the birth process is completed was rejected in view of the findings of modern medical science that a "viable" child (when the fetus reaches such a stage of development that it can live outside the uterus) was capable of and actually maintained a separate existence. The court summarized its position at page 143 as follows:

> "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884." (Referring to Justice Holmes' decision in *Dietrich v. Northampton, supra.*) (Comment ours.)

The absence of any substantial or recognized precedents did not deter other jurisdictions from quickly following the trail blazed for them with the *Bonbrest* decision. Beginning in 1949, there has been a growing number of cases which now recognize recovery.

1949 In *Verkennes v. Corniea,* 229 Minn. 365, 38 N.W. 2d 838 (1949) the Supreme Court of Minnesota held that recovery would be allowed against a tortfeasor for the wrongful death of an unborn child which was viable. The same year in *Williams v. Marion Rapid Transit,* 152 Ohio St., 114, 87 N.E. 2d 334 (1949), reversing its former position, the Supreme Court of Ohio held that an unborn child which was viable was a "person" within the constitutional provision affording a remedy to every person for injury done him in his person.

1950 Shortly thereafter, in 1950, the Supreme Court of Ohio again considered the matter and permitted a wrongful death action for a viable child fatally injured. *Jasinsky v. Potts,* 153 Ohio St., 529, 92 N.E. 2d. 809 (1950).

1951 In 1951 Maryland permitted such an action to a viable child in the case of *Damasiewicz v. Gorsuch,* 197 Md. 417, 79 A. 2d 550 (1950). The court stated in its opinion on pages 560 and 561 as follows:

> "When we examine the reasons behind them (contra cases), we find them based upon an outworn point of view, now rejected by modern medicine and rejected by the later cases. We think the modern view is the correct one, and *** we think our decision should be made on the basis of present day knowledge. ***
>
> "The common law does not depend upon the knowledge of facts, although such knowledge, or the lack of it, may result in different interpretations at different times. The law itself deals with rights, and since we now know a child does not continue until birth to be a part of its mother, it must follow that as soon as it becomes alive it has rights which it can exercise. When it becomes alive is a medical question to be determined in each case according to the facts."

In the same year the New York Court of Appeals in *Woods v. Lancet,* 303 N. Y. 349, 102 N.E. 2d. 691 (1951), overruled its earlier decision in *Drobner v. Peters, supra,* and held that a prematurely born child could bring an action to recover damages for injuries sustained en ventre sa mere. The court referred to "impressive affirmative precedents" which had developed since its earlier decision. Also, in 1951, the Supreme Court of Georgia followed suit in its decision in *Tucker v. Carmichael, Inc.,* 208 Ga. 201, 65 S.E. 2d. 909 (1951).

1952 The year 1952 found the Supreme Court of Illinois specifically overruling its earlier decision of *Allaire v. St. Luke's Hospital, supra,* when it fell in line with the developing trend of cases from other jurisdictions. *Amann v. Faidy,* 415 Ill. 422, 114 N.E. 2d. 412 (1953). The court, in reexamining the question, expressed its present position in the following manner, on page 417 of its opinion:

> "Upon a reappraisal of the question, we conclude that the reasons which have been advanced in support of the doctrine of non-liability fail to carry conviction. We hold, therefore, in conformity with the recent decisions of the courts of last resort of New York, Maryland, Georgia, Minnesota and Ohio, and the District Court for the District of Columbia, that plaintiff, as administratrix of the estate

of a viable child, who suffered pre-natal injuries and was thereafter born alive, has a right of action against the defendant whose alleged negligence caused the injuries."

Missouri also joined the growing list of jurisdictions in 1953 in *Steggall v. Morris*, 363 Mo. 1224, 258 S.W. 2d. 577 (1953), when it allowed the action for injuries to a viable child.

1954 In *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954), the highest reviewing tribunal of Mississippi allowed recovery under the wrongful death statute in that state for the death of an unborn viable child.

1955 The Supreme Court of Connecticut had two cases involving pre-natal injuries to viable children before it in 1955 and allowed recovery in both instances. *Tursi v. New England Windsor Co.*, 19 Conn. 242, 111 A. 2d. 14 (1955); *Prates v. Sears, Roebuck & Co.*, 19 Conn. 487, 118 A. 2d. 683 (1955). Oregon also followed suit that same year in *Mallison v. Pomeroy*, 205 Ore. 690, 291 P. 2d. 225 (1955).

1956 The Delaware Supreme Court allowed recovery for pre-natal injuries suffered to a viable child and thereby also joined in the trend of the modern decisions. *Worgan v. Greggo & Ferrara, Inc.*, 128 A. 2d. 557 (1956). The court in its opinion on page 558 made an interesting observation as to the law of the future in the United States in this field when it stated:

"Nearly all these Courts repudiate the theory of the Dietrich case to the effect that a viable fetus is part of its mother and has no separate existence apart from her body. All of them hold that a viable fetus injured or killed by the negligence of another is entitled to sue either on its own behalf or through an administrator, depending upon whether it survived the accident. Leading text writers have also condemned the rationale of the Deitrich case. Thus, Prosser, Law of Torts, (2d Ed.) 1955, page 174, has this to say:
'All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof.
'This criticism has at last had its effect. Beginning with a decision in the District of Columbia in 1946, a series of cases, many of them overruling former holdings, have held that an infant born alive may maintain an action for prenatal injuries and that an action for wrongful death will lie where it dies as a result of such injuries after birth. The reversal is so definite and marked as to leave no doubt that this will be the law of the future in the United States.'"

The year 1957 found the issue squarely before the highest appellate court of New Hampshire which allowed recovery on behalf of a stillborn child. *Poliquin v. MacDonald*, 135 A. 2d. 249 (1957).

Summarizing, there are now *thirteen* jurisdictions which have permitted recovery since 1946. These states are Connecticut, Delaware, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, New Hampshire, New York, Ohio, Oregon and the District of Columbia. The trend is so rapid and pronounced that it will probably be followed shortly in other states as the issue presents itself to the appellate courts. It is noteworthy to mention that California in *Norman v. Murphy*, 124 Calif. App. 2d. 95, 268 P. 2d. 178 (1954); Massachusetts in *Bliss v. Passanesi*, 326 Mass. 461, 95 N.E. 2d. 206 (1950), and *Cavanaugh v. First National Stores, Inc.*, 329 Mass. 179, 107 N.E. 2d. 307 (1952), have recently considered the problem again and still deny recovery.

The appellate courts of the seven additional jurisdictions which still deny recovery have not reviewed the question since the trend was initiated in 1946 and since it gained substantial momentum in 1949. Lower courts in these various jurisdictions may now be challenging the rule. (A survey of all such recent lower court decisions is outside the scope of this article). For example, the state of Pennsylvania rejected recovery in 1940 in *Berlin v. J. C. Penney Co., Inc., supra.* This ruling was followed by a lower court in *Jacketti v. Pottstown Rapid Transit Co.*, 67 Mont. County L.R. 37 (1950) but was recently rejected in another lower court in 1958. *Von Elbe v. Studebaker-Packard Corp.* 106 Pgh. Legal Journal 219 (1958). The six other states which have not reviewed the issue recently but which have denied recovery in cases decided before 1946 are as follows: Alabama—*Stanford v. St. Louis, San Francisco R. Co.*, 214 Ala. 611, 108 So. 566 (1926); Michigan—*Newman v. Detroit*, 281 Mich.

60, 274 N.W. 710 (1937); New Jersey—*Stemmer v. Kline,* 128 N.J. Law 455, 26 A. 2d. 489 (1942); Rhode Island—*Gorman v. Budlong,* 23 R.I. 169, 49 A. 2d. 704 (1901); Texas—*Magnolia Coca-Cola Bottling Co. vs. Jordan,* 124 Tex. 347, 78 S.W. 2d. 944 (1935); Wisconsin—*Lipps v. Milwaukee Elec. R. & Light Co.,* 164 Wis. 272, 159 N.W. 916 (1916).

The Requirement Of Viability

Several of the recent cases lead one finally to a consideration of the question of viability as a necessary prerequisite for allowing the cause of action.

In most of the cases which have championed the new approach and allowed recovery, the facts have indicated that the child was viable at the time of injury. In other cases the courts have expressly limited their holdings to situations involving viable infants. This would appear to be a natural process of evolution of the law on the subject because of the great emphasis placed in the early decisions on the lack of and independent legal personality to whom a duty was owed. However, the broad language used in *Montreal Tramways v. Leveille,* quoted *supra,* indicates that the Canadian court in 1933 may well have permitted the action regardless of the child's state of development, but the case does not serve as a clearcut decision on this point. In New York in 1953, the matter was squarely ruled upon by the Court of Appeals when a recovery was allowed for injuries to a fetus in the third month of development. *Kelly v. Gregory,* 282 App. Div. 542, 125 N.Y. S. 2d. 696 (1953). Three years later in *Hornbuckle v. Plantation Pipe Line Co.,* 212 Ga. 504, 93 S.E. 2d. (1956) the Georgia Supreme Court held that "if a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover." A similar holding was made in a lower court case in Pennsylvania. *Von Elbe v. Studebaker-Packard Corp., supra.*

Support for the further advancement of the case law into the area of non-viability can be found in the dissenting opinion of Chief Justice Brogran in *Stemmer v. Kline, supra,* where he wrote as follows:

> "While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence of the child upon the mother except for sustenance. ***It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality."

Of particular interest in this phase of the issue under discussion is the right of recovery in relation to death cases under wrongful death statutes. It is generally stated that wrongful death statutes fall into two categories, the so-called "survival" statute and the "new cause of action" statute. A review of the cases shows that seven jurisdictions out of the thirteen mentioned above have passed on the question in relation to wrongful death statutes. These are Mississippi, Missouri, Minnesota, Illinois, Delaware, Ohio and New Hampshire. In three of these jurisdictions, Missouri, Illinois and Ohio, the child in the cases involved lived for a time after birth. Therefore, the argument could not be raised that the child never came into existence or became "a person" within the meaning of the statutes. In the Delaware case, *Worgan v. Greggo and Ferrara, Inc., supra,* the reported decision does not mention whether or not the child was born alive. In the cases in two jurisdictions, Mississippi and Minnesota, the infant was a full term child but was born dead. In both of these cases the court held that the child was viable, therefore, a "person" within the contemplation of the statute. The statute in each case was a "new cause of action" statute as distinguished from a "right of survival" statute.

On the other hand, in *Drabbels v. Skelly Oil Co.,* 155 Neb. 17, 50 N.W. 229, a 1951 case, the Supreme Court of Nebraska met the issue headon.

The question as stated in the court's opinion was:

> "Whether the administrator of the Estate of an unborn child which dies prior to birth as a result of another's

negligence has a cause of action on behalf of the next of kin of the unborn infant under the wrongful death statute."

The statute involved was in the "survival" category.

Answering the question in the negative, the court went along with the reasoning of an earlier case; that an unborn child is a part of the mother until birth. The opinion is critical of the Minnesota case, *Verkennes v. Corneia, supra,* and states that the holding of the Minnesota court was contrary to the great weight of authority. The basis of the holding of the Nebraska court was that, "We can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned."

In a recent South Carolina case, *West v. McCoy,* 105 S.E. 2d. 88, the supreme court of the state, held that under the South Carolina statute, a cause of action would not lie for the death of an unborn child. In that case the mother was 5½ months pregnant when she suffered a miscarriage as the result of trauma. The court said that there was a medical distinction between the term "embryo" and "viable fetus", and a fetus does not usually become a viable child until between the sixth and seventh month of its existence.

However, in the New Hampshire case of *Poliquin v. McDonald,* 135 A. 2d. 249, *supra,* the supreme court held that the wrongful death statute of that state supports a right of action in favor of the personal representative of a viable infant for injuries and resulting death by it while *en ventre sa mere.* Apparently this was also a "survival" type statute.

Summarizing, at the present time viability would be required proof in the great majority of the thirteen jurisdictions which have adopted the new approach suggested by the advance in medical knowledge on the subject. This argument is most pronounced in cases brought under wrongful death statutes. However, even this may soon be judicially abolished in the wake of further scientific statutes in the field of congenital deformities or fatalities induced or caused through trauma during gestation. See, Scientific American, October, 1957.

Conclusion

The impact of recent decisions has made the question of recovery for harm to unborn infants a dynamic and expanding area of tort liability. The astute and experienced trial lawyer and insurance company supervisor in those jurisdictions which have not yet adopted the new approach will readily appreciate the ever increasing possibility of having to adjust claim management procedures to meet this problem foursquare. In other jurisdictions which have recently been faced with the problem, one might wonder if the analogy in this field of pre-natal injury will be suggested in the future, as medical knowledge continues to advance, in order to allow recovery for disability caused by nervous conditions or upsets causally connected by competent medical testimony as having come from fright or shock to participants in accident who otherwise did not sustain trauma or impact.

Trends In Compensable Heart Incidents

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TO WATCH the agonizing death throes of a nobly conceived and eminently existing body of law is discouraging and disheartening. Especially is this so when the mortal wounds are inflicted by our courts piece-meal in such a fashion as to shred the dying body of law to infinitesimal bits and thus cause it to pass into oblivion. All this is being done under the guise of the courts responding to the social demands of the people and the times, aborting the constitution separation of governmental powers by unblushingly invading the realm and prerogatives of the legislative branch.

The question remaining is not how far will the workmen's compensation law move from the original intention of the legislature, but whether the break-through has already been made heralding the day of pure compulsory accident and health insurance instead of compensation liability flowing from incidents "arising out of the employment."

The industrial revolution first in Britain and soon after in America resulted in phenomenal changes in our way of life—both social and economic. It necessarily followed that our common law was found to be lacking in its ability to cope with the new social problems involved. The tremendously increased frequency and severity of industrial accidents and manifold burdens thus cast on individuals and society point up the need for laws with a new and fresh approach.

Without debating the timeliness of the changes ultimately inaugurated, come they did, beginning in the early 1900's, the "fresh approach" admittedly provided radical changes in the common law including a mutual exchange and surrender of certain hitherto established inalienable rights.

This exchange included the acceptance on the part of the employer of unconditional responsibility for injuries suffered by the employee "arising out of" and "in the course of the employment"—to the extent of limitations enumerated and imposed by statute.

Happily, the system proved competent and helpful and finally found with but few differences unanimous acceptance throughout the nation. The commissions and boards[1] initially established to administer the law, together with the courts, with remarkable fairness and impartiality performed the function assigned by the legislature. The announced and proper practice of resolving questions of doubt in favor of the injured was consistently followed and a great new body of law became established.

As time passed, unfortunately—perhaps unknowingly at first—additional changes in the administration of compensation claims began to creep in due to a number of factors. The first, but not necessarily the most important, was the political composition of many of the boards and commissions established by the legislature in giving birth to the compensation act itself. The concurrent rise in labor unionization gave added impetus to the trend away from strict impartiality of commissions politically appointed. Secondly, if this were not enough, many administrators of the various acts assumed the air and self-appointment of a social worker rather than a trier of facts—the authority conferred upon them.

With appellate practice historically refraining from reviewing the facts and testing the sufficiency only of the law as applied, ultimate decisions on appeal began to further color the issue, as one after another administrative determination of matters of fact with resulting conclusions far divorced from the original legislative intent were upheld on appeal as to law only. This vicious circle once established became self-perpetuating as the arbitrators and commissions took comfort and found justification for their indivi-

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[1]Five states have court administered acts—Alabama, Louisiana, New Mexico, Tennessee and Wyoming.

dual "expression" of the compensation act as contrasted to its original intent and benefits legislatively e s t a b l i s h e d and amended.

The monster, inflation, too, played its not so devious part. Some commissioners openly acknowledged their feeling that the benefits of the act were behind the times and instead of properly awaiting legislative consideration and improvement, further expansion in the benefits, scope and intent of the act was produced under the guise of authority as trier of the facts.

This phase of expansion and development in the compensation law marches steadily forward without benefit of legislative sanction until one now wonders how long we will adhere to the fast fading legal hypothesis that the injury to be compensable must be sustained as "arising out of the employment." Daily new decisions appear throughout the nation overruling decisions of long standing in many jurisdictions and swinging nonchalantly to the new liberalized philosophy. The problem as it concerns coronary incidents is quite the classical illustration.

Obviously involved is the theory distinguishing the "usual" versus the "unusual" conditions which the courts have applied in determining compensability of heart incidents. With rapidity the majority of our states seem to be discarding the test of usualness. For example, New Jersey originally seemed committed to the unusual exertion theory in its interpretation of compensable heart cases, but now seems to join New York and the majority of other states in discarding this approach.

This is confirmed in the recent and sweeping New Jersey case of *Cuiba v. Irvington Varnish and Insulator Company,* 141 A. 2d 761, overruling *Seiken v. Todd Shipyard,* 67 A. 2d 131. In this instance, the employee's death was held due to a heart attack resulting from his normal work and thus construed a compensable accidental injury. As the English courts have in a number of ways preceded American doctrine and philosophies, the court in the *Cuiba* case leaned heavily upon the English appraisement of the situation. The court, in adopting the English viewpoint, quoted Lord MacNaghten in Fenton: "If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him." New Jersey feels there is no sound reasoning for differentiating heart seizures due to effort and exertion casually related to the employment from other injuries so induced—and true this is, save for the question of how far can the human imagination prescribe just what is "casually related" to the employment and thus "arises out of the employment." The court in the *Cuiba* case, concurrently overruling the *Seiken* case, reaffirmed the holding there in a small way by saying: "It is to be presumed that injury or death from heart disease is the result of natural physiological causes and the onus is on the claimant to prove by preponderance of the probabilities that the employment was a contributing cause of the injury or death." (This was later restated in *Yeomans v. Jersey City,* 143 A. 2d 174, page 181.) Reasonable probability was described as the standard of persuasion or evidence in quantity sufficient to generate belief that the tendered hypothesis is in all likelihood the fact. The court found that the decedent, even though he had suffered from heart and arterial insufficiency for more than a year prior to the mortal seizure, had come to his death as the result of his work even though it was of the type he had been customarily performing for many years.

This philosophy seems best summarized in a quotation from Lord Loreburn, House of Lords, when he stated: "An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health." *Clovin, Clayton and Company, Ltd. v. Hughes.*

Another recent interesting determination by the New Jersey court on the question of arising out of the employment (but not involving a cardiac incident) is the case of *Lewis v. Walter Scott and Company,* 141 A. 2d 807, the court saying: "An accident arises out of the employment when the result of such an occurrence is reasonably incident to the employment." Taken as a statement of principle, such a pronouncement is most valid; however, the difficulty arises when one reviews the statement of facts only to learn that in a particular incident an in-

creasingly broadened interpretation is granted. In the *Lewis* case the employee received his injury on an icy public sidewalk which the court found to be the only means of access from the parking lot utilized by the injured to his employer's building. The fact that the injured was subjected to no greater hazard due to his employment than the general public was held for naught.

New York twenty years ago denied compensation to an employee who died shortly after a routine lifting job, *Lerner v. Rump Brothers,* 194 N. E. 334, but shortly thereafter permitted recovery for a truck driver who died from the strain of cranking his truck. In this instance the court found that motor trouble resulting in the refusal of the engine to start provided the unusual element necessary, *Green v. Geiger,* 20 N. E. 2d 599. Within a few years an award was granted for a heart attack suffered by a housekeeper incurred following her climbing four flights of steps three times within twenty minutes while carrying a mirror, *McCormick v. Wood Harmon,* 42 N. E. 2d 613.

The rule of unusualness was discarded in New York as a practical matter by the end of World War II when the court held that a policeman on an outside beat during extremely cold weather and during a snow storm, though it was his regular job to be performed in all kinds of weather, was sufficiently unusual to support an award, *Flammer v. Bethlehem Steel,* 66 N. E. 2d 588. This was followed by a finding that remaining in a cramped position for an hour inside a boiler was a sufficiently unusual strain to constitute an accidental injury, *Brooks v. Elliott Bates, Inc.,* 65 N. E. 2d 340.

Presently, New York prolifically continues in its adherence to the compensability of heart incidents, the court holding that moving boxes in the regular course of employment is an unusual exertion and a myocardial infarction is thus accidental and compensable, *Spector v. Grossman,* 175 N. Y. S. 2d 597. A manager who died after doing some manual work also suffered a compensable accident, *Everett v. George Haxton & Sons, Inc.,* 176 N. Y. S. 2d 74.

In another case the employee died of a coronary thrombosis, having suffered three prior heart attacks on the job. Here the court found that the prior attacks weakened the heart muscle, thus rendering the decedent more susceptible to thrombosis. Held compensable, *Cianca v. Reed Glass Co.,* 176 N. Y. S. 2d 33.

Other states following the general pattern include Indiana which has determined that a grinder suffering a heart attack in doing his usual work incurred an accidental injury in that the decedent's usual work was overwork for his particular heart, *U. S. Steel v. Dykes,* 148 N. E. 2d 844.

In Idaho the stress and strain to which an employee is subjected in doing his regular work, not heavy in nature, has been found to be not unusual for an employee with a healthy heart, but was held most unusual to another employee by virtue of his afflicted heart, *Laird v. State Highway Department,* 323 P. 2d 1079. In a later case a school bus driver, age forty-three, in the regular course of his employment put chains on the bus before starting out on his run during a snow storm. He suffered a myocardial infarction after driving one-quarter mile on a winding mountain road which incident was deemed a compensable accident, *Whipple v. Brundage,* 327 P. 2d 383. This decision cited and followed *Pinson v. Minidoka Highway District,* 106 P. 2d 1020, and *Lewis v. Department of Law Enforcement,* 311 P. 2d 976, in which the court said: "If the claimant be engaged in his ordinary, usual work and the strain of such labor becomes sufficient to overcome the resistance of claimant's body and causes injury, such injury is compensable."

Georgia has for some time adhered to the reasoning that an unexpected result is sufficient to provide the "accident." In *Williams v. Maryland Casualty Company,* 21 S. E. 2d 478, the court clearly stated the philosophy to be followed in that jurisdiction: "An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health." Thus, Georgia has found that heart failure can actually result from work lighter than usual, but is no less compensable so long as the exertion is deemed to have precipitated the attack, *Lumbermen's Mutual v. Kitchens,* 59 S. E. 2d 470. Similarly it has been determined that a bookkeeper is entitled to compensation, having suffered a heart attack five

minutes after having walked up a single flight of steps, *Bussey v. Globe Indemnity,* 59 S. E. 2d 34. More recently (and as would be anticipated) lifting a thirty-pound block was sufficient exertion to make a heart attack compensable, the court saying that: "Heart disease is associated with overwork." And thus lifting a thirty-pound block ". . . was the heavy work and exertion the claimant was performing in compliance with his duties as a butcher." *Glens Falls Indemnity Company v. Gargal,* 103 S. E. 2d 643. Georgia, however, was recently forced to deny compensation in *Morgan v. Travelers Insurance Company,* 104 S. E. 2d 257, in which the court found that the heart attack was ". . . not precipitated by any exertion arising out of and in the course of the employment." The most the decedent did to exert himself was to turn out the lights in the employer's office after the annual Christmas party.

Missouri has yet followed a more moderate trend, stating in the case of *Crow v. Missouri Implement Company,* 307 S. W. 2d 401, ". . . that unusual or abnormal strain arising out of the employment is compensable." Certainly as a statement of policy this is quite equitable and it is merely the interpretation of what is and what is not "unusual" factually that is the basis of the problem. Crow's widow was awarded compensation as the decedent had been subjected to the strain of supporting a one-hundred-fifty-pound cornpicker elevator while making repairs to the machine. In *Carriker v. Lindsey,* 313 S. W. 2d 43, the court denied recovery holding that the injury did not arise out of the employment when the employee sustained his injury while working on his own car at his employer's service station.

Mississippi, too, has been one of the more vigorous states in pursuing the philosophy of compensability of heart incidents. In *Lewis v. Trackside Gas Station,* 103 So. 2d 868, the court found that a single gas station attendant on duty on Easter morning suffered a compensable heart attack because of the amount of business then being transacted by his employer, the court holding that it is ". . . not necessary to show exertion in itself unusual or beyond the routine of the employment." Mississippi has also held that a butcher who suffered a fatal heart attack while slicing ham on a slicing machine during his usual routine work entitled his dependents to compensation, *Pennington v. Dependents of Smith,* 100 So. 2d 569.

A log scaler, who had previously experienced a coronary incident while hunting, but thereafter neglected medical attention, was sitting down engaged in general conversation with a fellow employee while waiting for more work to do. A fatal heart attack then suffered was found compensable, the court saying it is ". . . not necessary to show that exertion which concurred in precipitating the harm was in itself unusual or beyond the routine of employment. . . . The exertion may be usual and customary," and still be accidental and arise out of the employment, *Poole v. Learned and Son,* 103 So. 2d 396.

Perhaps the crowning case not only in Mississippi, but throughout the nation on the question of "arising out of the employment" is the recent decision of *Insurance Department of Mississippi v. Dinsmore,* 104 So. 2d 296. This held that mental and emotional exertion associated with sedentary employment as a contributing cause is sufficient to make a cerebral thrombosis compensable. Justices Roberds and Gillespie logically dissented.

It would be remiss to overlook several recent decisions with viewpoints in the minority. The State of Washington has held in *Kruse v. Department of Labor,* 326 P. 2d 58, that a heart attack suffered in pursuing normal routine duties is not compensable. This is further followed in *Hodgkinson v. Department of Labor,* 326 P. 2d 1008. Colorado, too, has found that no over-exertion existed in the employee's pursuing his regular truck driving duties, *Industrial Commission v. Horner,* 325 P. 2d 698.[2]

Admittedly, no effort has been made to cover this problem in every state, but nonetheless it seems proper to conclude that compensability of coronary incidents is and will continue to be the forerunner of the philosophy discarding as archaic the requirement that to be compensable an industrial injury must arise out of the employment and the remaining and thus controlling test will merely be whether the accident occurs in the course of the employment.

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[2]Perhaps the fact that both Colorado and Washington have state funds has some bearing on the viewpoint taken.

Conversion Hysteria—An Explanation for Attorneys*

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"CONVERSION Hysteria" is a diagnostic term used by physicians and particularly in one specialty of medicine —namely psychiatry. Attorneys encounter this term as it is applied to certain individuals who come to them in the course of their practice particularly in cases involving personal injury and claims for compensation. This paper is being presented in an effort to explain and clarify this diagnostic term for attorneys.

The term hysteria is an inappropriate one. It has a very long history and the word itself is derived from the Greek word for "uterus." In this illness, the ancient physicians believed that the uterus had the ability to wander about the body and the symptoms were supposed to be due to its action in its new location. Obviously—in the light of modern knowledge—this antiquated explanation and the term itself cannot be regarded as either scientific or appropriate but the term does continue to be in common use. The diagnostic term which is more appropriate and is the subject of present day usage is "conversion reaction." This diagnostic category is a sub-group of a major diagnostic grouping called psycho-neuroses or simply neuroses. Some of the other reactions which occur as sub-groups under the neuroses are anxiety reactions,—phobic reactions,—obsessive-compulsive reactions, and depressive reactions.

It is well to remember that most of the symptoms of emotional and mental illness are exaggerations of normal reactions. The difference between people of this kind and the normal individual is more often one of quantity rather than quality. Drawing clear-cut lines of distinction is frequently difficult. The normal tends to blend in to the borderline and the borderline into the abnormal. Let us first consider the neuroses as a whole and then proceed to consider conversion.

The neuroses are a major group in the classification of emotional and mental illnesses. They may be considered as substitutive reactions in which the patient's symptoms have a role in his mental workings. The symptoms tend to serve a purpose and represent an effort to solve some conflict in the individual's life situation. The neuroses are differentiated from the psychoses in that they are usually less severe. Distortion and disorganization of the personality is not present. Actually, the differentiation in this sphere is more apparent in the social behavior and outward adjustment of the patient in that the neurotic may have considerable internal disturbance and may be as disturbed internally in his emotional state as the psychotic patient. However, in the neurotic, this inner stress and disturbance does not produce the marked alterations in the external behavior and the social adaptability that is seen in the psychotic person. Another differentiating factor in the neurotic is that the mental apparatus which perceives and measures reality is relatively intact. This means that the neurotic remains sensitive to changes in his social environment and is able to make appropriate adjustments to such changes whereas the psychotic individual frequently suffers serious impairment in his ability to perceive and adjust to such changes.

We should also differentiate the neuroses from malingering, which is the conscious simulation of symptoms. This is particularly important in cases in which compensation is involved. Here, it should be pointed out that there are persons who consider all neurotics but most particularly hysterics as malingerers, i.e. they refuse to accept the patient's symptoms as being real, and they believe that he can control his symptoms. For the well trained physician, the differentiation is usually not difficult—symptoms of an illness generally form an orderly pattern. The malingerer usually presents sufficient discrepancies and contradictions in the pattern of his symptoms

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to enable the physician to make the diagnosis. Observation of the patient of which he is unaware is helpful and may make the differentiation for the physician. It is, of course, a tool which is most useful to the attorney.

I should like to re-emphasize the fact that the classification of the psycho-neuroses into the various types is often difficult. In addition to the merging and blending of these various types, it should be pointed out that they are not well defined entities, either from the standpoint of cause or symptoms. Another confusing factor is that the same term is frequently used for a single symptom as well as a diagnostic label for a whole grouping of symptoms. For example—anxiety is a term which refers to a symptom or a set of symptoms. Anxiety—when used to describe a symptom, frequently occurs in other psychiatric disorders as well as the psycho-neuroses. Also, anxiety state is a term which is applied to a category or a sub-group of the psycho-neuroses and as such is a diagnostic label rather than a label for symptoms. The same situation occurs with the term conversion. It is used to describe a mental mechanism, and a set of mental symptoms, and is also used as a diagnostic label for the sub-group which is called "conversion hysteria." It should be made clear then, that the conversion mechanism can and does operate in other psychiatric disorders but that in conversion hysteria the mechanism and the symptoms of conversion are predominant.

With the preceding material as background—let us now proceed to some consideration of conversion. Before explaining the mental mechanism of conversion, it is necessary to describe the one called repression. This is the mechanism by which impulses, desires and other thoughts which are painful or unacceptable to the individual's consciousness are moved from the area of awareness into the area of unawareness which we call the unconscious. This is not a conscious nor a voluntary action but it is rather an unconscious process and it operates normally in all of us. It should not be confused with suppression in which the same process is conscious and deliberate. Repression goes on all of the time and allows us to ignore things which might otherwise greatly disturb us. The disadvantage of this mental mechanism is that the energy of our drives, urges, and desires is not eliminated by the process of repression. This energy remains with us, is stored and tends to be built into an increasing potential. As it increases in potential, it seeks release or discharge. If the energy outlet is diverted toward useful and socially acceptable goals, the process is known as sublimation. If the energy is not directed outwardly in such a manner, it may be released in the form of symptoms or emotional disturbance.

In conversion, the energy which has been repressed is released in the form of an alteration of a physical or a physiological function which creates physical disability. This process of alteration is poorly understood and the selection of the particular physical function is also poorly understood. However, we do know that the resulting disability serves some purpose in the life of the individual and has some meaning to him although this meaning is hidden and not understood by him.

At any rate, we see that the problem or the emotional conflict has been converted into a physical symptom. This symptom is in a disguised form and affords the patient relief from his emotional problems, although he may not recognize this. Usually, the form and character of the physical symptom bears some relationship to the repressed material which has been converted. Examples of the physical symptoms of conversion are paralysis—blindness—deafness—inability to talk—anaesthetic areas, etc.

The conversion reaction is accompanied by what we call "secondary gain"; that is—it enables the patient to maintain self respect, and at the same time he is able to achieve something which his own integrity would not have permitted. Thus, it may serve as an attention-getting mechanism, or permit an escape from a difficult situation. It frequently is an excuse for failure. It should again be pointed out that this process is unconscious, and that the secondary gain is hidden from the patient by himself. This point needs to be emphasized since quite frequently the "secondary gain" is obvious to the patient's family and friends, and they assume that it is equally obvious to the patient. It is one of the reasons why these conditions are assumed to be self-controlled by the patient.

The factor of "secondary gain" is important, because it tends to perpetuate and

prolong the illness. It is for this reason among others that many of these conditions tend to become chronic, since the patient is unconsciously reluctant to be cured of the disability, because of its advantages or gains. In the traumatic neuroses, the factor of compensation is a very important one, usually because it is involved in the "secondary gain."

I referred previously to the symptom of anxiety. In the well developed and classical conversion reaction, one of the important diagnostic clues is the lack of anxiety. The lack of concern and calm acceptance of his physical disability is usually significant.

In cases in which the physical disturbances predominate, the diagnosis may become apparent from the discrepancy between the symptoms and the findings on examination. Referring to some of the examples previously cited; in paralysis—the reflex changes are usually at variance with the paralysis, and the muscles do not show the atrophic changes. Likewise, the paralysis may be selective, one voluntary action being present while another is not; in blindness, the reflexes are intact also and frequently the patient unconsciously avoids collision with objects; in deafness—hearing loss is usually not typical as compared to ordinary tests in deafness in which changes are more marked in some tonal ranges than others; in conversion reactions, the symptom of mutism is accompanied by other functions, such as writing, which might well be lost in the true organic neurological lesion; in anaesthesia, the distribution of the area does not follow that of the normal nerve pattern but is that which the patient believes it to be—the so called "glove" anaesthesia being an example. It is not the purpose of this paper to describe the differential diagnosis of conversion. This is the function of the examining physician. I have presented the above brief material for one purpose only. This is to indicate that there are methods of evaluation by which the diagnosis can be made positively in almost every case. Unfortunately, too frequently, the diagnosis is made on a negative basis by the process of exclusion—i.e. by the elimination of organic factors. While exclusion is a part of the process of diagnosis, one should not make a diagnosis on this basis alone, but must give consideration to the emotional life problems of the patient, in order to arrive at the diagnosis of conversion on the basis of positive factors involved.

There are two other terms used by the medical profession which merit our consideration at this time.

The first of these is compensation neurosis. This term is applied to those illnesses which may be either industrial or the result of accidental injury in which the factor of "secondary gain" is the most prominent feature. The majority of them are conversion reactions although it should be made clear that other neurotic reactions can occur.

Frequently, the patient is preoccupied with his efforts directed at securing damages or compensation or benefits of some kind. This concern may be obsessive and it may be so overwhelming that the illness may be classified as an obsessive reaction, or obsession may be only one of several other symptoms. The physician in the case is likely to find himself involved and to tend to take sides. It is difficult to remain unbiased in one's efforts to evaluate the individual case. In addition the outcome of the illness may be determined upon the outcome of litigation rather than the particular line of treatment adopted by the physician.

The term compensation neurosis actually is a poor one from several points of view. Diagnostically, it lays emphasis upon one factor—namely, that of secondary gain rather than being descriptive of the symptom picture presented by the patient. More importantly, the name prevents a logical or sympathetic understanding of the illness which is unconsciously determined. It is an emotionally "loaded" term. In this connection, it might be interesting to call attention to a recent paper by Dr. Gotten of Memphis. He studied one hundred cases of neck injury following auto accidents after the legal claims for damage were completed. He found that psycho-neurotic symptoms, once they had developed, persisted for many months. They were resolved to a great extent by the settlement of litigation. One of the most interesting comments made in his paper was that the results—whether the patient was improved or not improved,—seemed to have little relationship to whether the patient felt satisfied with the outcome of the settlement. His final conclusion was that

many emotional factors, but especially those concerning monetary compensation, greatly confuse proper medical evaluation and appear to be the cause of the wide divergence of professional prognostic opinion relative to this particular type of injury.

The second term is traumatic neurosis or more properly post-traumatic neurosis. This term is applied to neurotic reactions which have been attributed to or which follow some traumatic event or a series of such events. Any type of neurosis can follow trauma. The effect of trauma can have wide variations—it may serve to precipitate an incipient or latent neurosis. It may aggravate an already existing neurosis or it may seem to have directly caused the illness. The common factor in all cases is that the onset of the illness follows the trauma. If the trauma is industrial, or accidental, with compensation involved, then it becomes obvious that the terms traumatic neurosis and compensation neurosis become synonymous—or possibly it would be better to say that they become concurrent.

The term has also been applied to combat and war neurosis. More recently, the changes which have been induced by "brain washing," have been included in the traumatic neuroses. In this category, while physical trauma may be a factor, the major factor is psychological trauma which is carefully but insidiously and cruelly applied in a repetitive fashion over a prolonged period of time. The fact that even emotionally strong persons do have a breaking point, if certain facets of their personality structure are exploited, is clearly brought out by this process.

This discussion leads us to a consideration of a basic concept of emotional illness. In one sense, all of our emotional disorders might be regarded as traumatic. Trauma, usually of a psychological character, may be thought to lay the early foundations upon which later emotional illnesses may develop. However, we now tend to broaden the term trauma to the term *stress*.. All of us undergo stress of varying kind and degree. The difference lies in the highly variable capacity to tolerate it on an individual basis. The pre-existing personality experience and adjustment are most important in the determination of the response of any one individual to the stress he encounters. Thus the reaction or response of a person to stress is the sum total of his personality adjustment plus the kind and degree of the stress of the situation at hand. The individual response to any stress must be measured in terms of the meaning of that stress to the person involved.

On this basis, one can understand that the degree of emotional disturbance which follows from a traumatic experience is not in direct proportion to the intensity of that experience. In one instance a severe neurosis may follow minor stress, and in the next instance, only a moderate neurosis may follow maximal stress.

The neurosis affects the whole personality structure, and tends, in symptoms, to exaggerate certain characteristics of the personality. While it has already been stated that the pre-existing personality will determine the kind of response, this should not be taken to imply weakness of the personality. Unfortunately, when the physician describes a patient as having a psychoneurotic personality, or having a predisposition toward the development of a neurosis, this is taken to mean an inherent weakness for which the patient should be condemned.

All of us have a predisposition toward one type of illness, or another, and the question of whether we will develop such an illness seems to be dependent on chance—that is, whether we encounter stress of the particular type to which we are susceptible and in sufficient degree in our individual case to produce illness.